
(2008) 02 MAD CK 0119
In the Madras High Court
Case No : A.S. No. 681 of 1996

R. Elumalai

APPELLANT

Vs

M. Singara Mudaliar, Raju and Sampath

RESPONDENT

Date of Decision : 08-02-2008

Acts Referred:

Evidence Act, 1872 — Section 101
Specific Relief Act, 1963 — Section 19, 27

Citation : (2008) 02 MAD CK 0119

Hon'ble Judges : S. Tamilvanan, J

Bench : Single Bench

Advocate : S.D.N. Vimalanathan, for the Appellant; S.S. Balasubramaniam, for Respondent-2, for the Respondent

Judgement

S. Tamilvanan, J.—This appeal has been preferred against the judgment and decree dated 16.04.1993 made in O.S. No. 15 of 1990 on the

file of the Subordinate Judge, Kancheepuram.

2. The appellant herein was the plaintiff in the suit before the Trial Court. The suit was filed seeking a decree for specific performance of contract

of sale of the schedule mentioned property and alternatively for return of the advance amount paid towards balance of sale consideration to the first

respondent/D1 with interest and costs and also for permanent injunction restraining the respondents from any way interfering with the peaceful

possession and enjoyment of the suit property as a cultivating tenant and also for costs of the suit.

3. It is seen that the first respondent/D1 remained absent before the Trial Court. Considering the oral and documentary evidence and also the

arguments advanced by both sides, the Trial Court partly decreed the suit as

against the first respondent herein and directed him to return Rs.

10,500/- to the appellant/plaintiff, with regard to the other prayer of the suit, the same was dismissed with costs. Aggrieved by the said judgment,

this appeal has been preferred. Even in this appeal there is no representation for the first respondent.

4. As per the case of the appellant herein, he was the tenant of the suit property, an agricultural land, and that he entered into the oral agreement for

sale, with the first respondent, in order to purchase the property for the sale consideration of Rs. 45,000/-. As per the oral agreement, on

06.03.1988, the first respondent had received Rs. 1,000/- from the appellant and subsequently received Rs. 10,500/- in the presence of witnesses

and handed over a letter, acknowledging the receipt of the said amount and also oral agreement between himself and the appellant. According to

the appellant, the second respondent being his nephew had knowledge about the agreement of sale entered into between the appellant and the first

respondent and he was also an attestor to the un-registered lease deed dated 06.03.1988 entered into between the appellants and the first

respondent. According to the appellant, the respondent colluded himself with the first respondent and executed a sale deed in favour of the second

defendant while the agreement between the appellant and the first respondent was in existence.

5. According to the learned Counsel for the appellant, the sale deed executed by the first respondent in favour of the second respondent was only

a sham and nominal document so as to receive the claim of the appellant and therefore, based on the oral agreement the appellant is entitled to get

the decree for specific performance of the contract in the Court of law and also for permanent injunction against the respondent as cultivating

tenant. It is also submitted by the learned Counsel that no dispossession can be made in the suit property unless under due process of law. In

support of his contention the appellant has examined himself as P.W.1 apart from examining P.Ws.2 to 4 and marking Exs.A1 to A5 on the file of

the Tribunal. The second respondent was examined as D.W.1, apart from marking Exs.B1 to B23. The appellant as P.W.1 has deposed that he

has been the cultivating tenant of the suit property and he entered into the oral agreement for sale with the first respondent to purchase the suit

property for the sale consideration of Rs. 45,500/- and also paid Rs. 1,000/- towards part payment of consideration and subsequently paid Rs.

10,500/- and hence totally paid Rs. 12,500/- to the first respondent. Subsequently, the second respondent entered with the question of enjoyment of the suit property by the appellant and he lodged a complaint before the police and also before the village Panchayatars.

6. According to the appellant/P.W.1, Ex.A2 is the letter given by the second respondent in the presence of the witnesses and Panchayatars. He

has also produced Ex.A3-kist receipt for the payment made by him on 13.12.1989. According to the appellant/P.W.1 though he was ready and

willing to perform his part of the contract as per the oral agreement of sale the first respondent without performing his part of the contract executed

the sale deed in favour of the second respondent. According to him, the second respondent had knowledge about his agreement of sale and

therefore he has entered into a decree for specific performance as prayed for. It is not in dispute that the appellant is the Maternal uncle of the

second respondent and also brother of the second respondent's father-in-law. Though he has denied the signature available in Ex.A2, he has

admitted in his cross examination that his father-in-law/Kannayiram has signed as one of the attestors to Ex.A2. P.W.2, has deposed that he was

the witness for the oral sale agreement by which the first respondent had agreed to sell the suit property to the appellant for a sum of Rs. 45,500/-

and received Rs. 1,000/- as advance/part of the sale consideration.

7. According to P.W.3, he was a witnesses to Ex.A1 executed by the first respondent in favour of the appellant herein for the receipt of Rs.

10,500/- towards part of sale consideration relating to the suit property. According to him, the second respondent had knowledge about the sale

agreement entered between the appellant and the first respondent and that he was a witnesses to Ex.A4. He has further deposed that in Ex.A5 un-

registered lease agreement between the appellant and the first respondent he along with the second respondent signed as an attestor to the

document. However, he has stated in the cross examination that though the first respondent was set ex-parte in the suit he was also present in the

Court. According to him, he has also signed in Ex.B1, Sale Deed executed by the first respondent in favour of the second respondent. According

to P.W.4, the appellant has been the cultivating tenant of the suit property under the first respondent and that he was one of the signatory to Ex.A2

executed by the second respondent in favour of the appellant in which other witnesses, the brother of the second respondent has signed as witnesses.

8. Mr. S.D.N. Vimalanathan, learned Counsel appearing for the appellant has submitted that though the appellant has established the facts that he

has been the cultivating tenant of the suit property and in the un-registered lease agreement, Ex.A5, relating to the suit property on 06.03.1988

itself, the second respondent had signed as one of the attestors and learned Counsel further submitted that Ex.A2 has been written by the second

respondent, wherein he had admitted the oral agreement between the appellant and the first respondent whereby the appellant agreed to purchase

the suit property for Rs. 45,500/- and pay part of sale consideration of Rs. 11,500/- on different dates and therefore the appellant has established

the alleged oral sale agreement between himself and the first respondent and also the fact that the second respondent had knowledge about the

said sale agreement, on the date of sale deed, Ex.B1. According to him, the second respondent is nothing to do with sale agreement, since he is

not a signatory to the said document. Though the second respondent has denied the signatures in Ex.A2, it is seen that the attestors to the said

documents were attestors to the sale deed, Ex.B1. According to P.W.4, even the brother of the second respondent, P. Sampath, who is in Border

Security Force, was the witness to Ex.A2. The second respondent as D.W.1 has not denied the said signature but, in his reply for a subsequent

question, he replied that he does not know the signature of his brother. The available evidence would clearly establish the fact that Ex.A2 had been

executed by the second respondent to the first respondent on 14.12.1989 on the same date of Ex.B1, sale deed. In Ex.A2 the second respondent

has admitted that the suit land has been cultivated by the appellant-Elumalai and as cultivating tenant he promised to clear the encumbrance with the appellant.

9. Mr. S.D.N. Vimalanathan, learned Counsel appearing for the appellant submitted that the encumbrance stated in Ex.A2 on the date of executing

the sale deed, Ex.P1, is referring only to the alleged oral agreement between the

appellant and the first respondent. Otherwise, the first respondent need not have stated about the encumbrance with reference to the appellant, the cultivating tenant of the suit property. It is clear that as per Ex.A2, the second respondent had knowledge about the fact that the appellant is the cultivating tenant of the suit property. He is also an attester and signatory to the un-registered lease agreement, Ex.A5. Further, as per Ex.A2 in the presence of witnesses who have witness to Ex.A2 as well as Ex.B1, Sale Deed the second respondent has agreed to clear the encumbrance with the appellant.

10. On the facts and circumstances, this Court can infer with the encumbrance stated by the second respondent could be the right of the appellant as cultivating tenant of the suit property and not about the alleged agreement for sale between the appellant and the first respondent. On the side of the second respondent, the sale deed executed by Kamatchammal and Dhamodharan in favour of one Thangammal on 16.01.1984, has been marked as Ex.B2, and the mortgage deed, dated 12.06.1967, has been marked as Ex.A3. The payment of electrical consumption charges relating to Thangammal has been marked as Ex.B9 to B12, B7, B9 and B16 to B19 are the documents subsequent to the sale deed, Ex.B1. As the issue involved in the suit and appeal is that there was oral sale agreement between the appellant and the first respondent prior to the sale deed, Ex.B1, and though the second respondent had knowledge about the same and therefore, the subsequent document to Ex.B1, are not relevant to decide the issues involved in this appeal.

11. As per the oral and documentary and evidence on record, the appellant has established that he had paid Rs. 11,500/- to the first respondent on two different dates. The first respondent has not disputed Ex.A.1, letter, dated 15.04.1989, wherein he has admitted that he had received a sum of Rs. 1,000/- as advance and then Rs. 10,500/-. According to the learned Counsel for the appellant, the aforesaid amount was paid towards the oral agreement, whereby the sale consideration was fixed at Rs. 45,500/- by the appellant and the first respondent. Though, it has been established that the first respondent had received Rs. 10,500/- from the appellant, stating the price of land at Rs. 45,500/- by his letter, date 15.04.1989, subsequently on 14.12.1989, he executed the sale deed, Ex.B.1, in

favour of the second respondent and also remained absent in the suit as well as in the appeal, which would show the indifferent attitude and conduct of the first respondent.

12. The evidence of P.Ws.1 to 3 would also sufficient to establish the fact that the first respondent had received Rs. 11,500/- from the appellant,

as stated in Ex.A.1. Therefore, the appellant is entitled to get back the aforesaid amount with 12% interest, as prayed in the plaint till the date of

Judgment and subsequently, 9% interest to be paid till the date of realisation with exemplary cost of Rs. 10,000/-:

13. The second respondent has disputed the alleged oral sale agreement between the appellant and the first respondent and according to him, he

had no knowledge about Ex.A.1, letter. According to the learned Counsel for the appellant, the second respondent had knowledge about the

alleged oral sale agreement and therefore, he cannot be construed as a bonafide purchaser of value for consideration. Further, the appellant has

deposited the balance of consideration in the Court to prove his bonafide and therefore, he is entitled to get specific purpose of the contract even

against the second respondent herein.

14. In support of his contention, the learned Counsel appearing for the appellant relied on the following decisions:

1. K.R. Manickam Vs. P. Kumaravel and 4 others,

2. M. Manoharadhas Vs. C. Arumughaperumal Pillai and Another,

3. B. Suresh Chand Vs. State of Tamil Nadu,

15. In the decision, K.R. Manickam Vs. P. Kumaravel and 4 others, , u/s 27(b) of Specific Relief Act, 1953, it has been held that transferee for

value in good faith without notice of agreement of sale, subsequent purchaser to enquire person who is in possession as to precise character of his

possession and failure to enquire must be treated as wilful negligence and cannot be treated as bonafide purchaser for value in good faith without

notice. In the instant case, it is not in dispute that the appellant is the maternal uncle of the second respondent and also his junior father-in-law. It

has been established that he was one of the attestors to Ex.A.5, unregistered lease deed, dated 06.03.1988, between the appellant and the first

respondent. Therefore, the second respondent had knowledge about the possession and enjoyment of property by the appellant as cultivating

tenant, however, there is no reliable evidence on the side of the appellant to establish that the second respondent had knowledge about the alleged oral agreement of sale between the appellant and the first respondent and further, the unregistered lease agreement between the appellant and the first respondent had been reduced into writing in a non-judicial stamp paper on 06.03.1988 and attested by witnesses. In such circumstances, there is no reason available on the part of the appellant in getting the alleged oral agreement for sale reduced into writing. However, as the appellant has established that he is in possession and enjoyment of the suit property as cultivating tenant, he is entitled to permanent injunction against the respondents.

16. In the decision, M. Manoharadhas Vs. C. Arumughaperumal Pillai and Another, , this Court has held that as per Section 19 of the Specific Relief Act, 1963, person who purchases property when there exists an agreement whereby vendor has agreed to sell same property to another person has to prove that he is bonafide purchaser. Burden of proof is on such purchaser.

17. In the decision, B. Suresh Chand Vs. State of Tamil Nadu, , the Full Bench of this Court has held as follows:

Under Section 101 of the Evidence Act, 1872 whoever desires any Court to give judgment as to any legal right or liability depending on the existence of facts which he asserts, must prove, that those facts existed. Therefore, it is for him to establish that there was no wilful abstention of enquiry or search of the facts, on his part about the vendor before the sale transaction was completed.

18. Therefore, the appellant is entitled to get permanent injunction restraining the respondents herein from in any way interfering with the peaceful possession and enjoyment of the suit property as cultivating tenant and as part performance of the contract, until evicted under due process of law.

19. In the result, the appeal is partly allowed with the following terms.

(a) The suit is decreed as against the first respondent directing him to pay Rs. 11,500/- to the appellant with 12% interest till the date of the Judgment of the trial court and 9% subsequent interest and exemplary cost of Rs. 10,000/-. However, there is no order as to costs, as against the second respondent.

(b) The respondents are restrained by an order of permanent injunction in any way interfering with the peaceful possession and enjoyment of the suit property as cultivating tenant and as part performance of the contract, until evicted under due process of law.