

Kumar Vs. Dhanapal

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Court : Chennai

Decided On : Sep-30-2013

Judge : R.S.Ramanathan

Appellant : Kumar

Respondent : Dhanapal

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS Dated:

30. 09.2013 CORAM THE HONOURABLE MR.JUSTICE R.S.RAMANATHAN
S.A.No.769 of 2013 and M.P.No.1 of 2013 1. Kumar 2. Nallu Padaiyachi ..
Appellantss/ Defendants Vs. Dhanapal .. Respondent/ Plaintiff Prayer:- Second
Appeal filed under Section 100 of Code of Civil Procedure against the Judgment
and Decree dated 27.6.2012 made in A.S.No.73 of 2010 on the file of the
Subordinate Court, Kallakurichi, confirming the Judgment and Decree dated
14.7.2010 made in O.S.No.53 of 2009 on the file of the District Munsif Court,
Sankarapuram. For appellants : Mr. T. Dhanyakumar For Respondent : Mr. P.
Valliappan J U D G E M E N T The defendants are the appellants.

2. The respondent/ plaintiff filed the suit in O.S.No.323 of 2005 on the file of the
District Munsif Court, Kallakurichi for specific performance of an agreement of sale
dated 14.9.2004 and the suit was decreed and the appeal filed by the appellants in
A.S.No.73 of 2010 on the file of the Subordinate Court, Kallakurichi was also

dismissed and aggrieved by the same, the Second Appeal is filed by the appellants.

3. The case of the respondent/ plaintiff as seen from the plaint is as follows: The 1st appellant/ 1st defendant is the owner of the suit property and the respondent/ plaintiff entered into an agreement of sale with the 1st appellant for the purchase of the suit property for a sum of Rs.57,000/- and on 14.9.2004 an agreement of sale was executed and on that date an advance of Rs.30,000/- was paid and the balance amount of Rs.27,000/- was agreed to be paid on or before 13.7.2005. Though the respondent/ plaintiff was always ready and willing to perform his part of the contract, the 1st appellant was not willing to execute the sale deed. The plaintiff also alleged that he is in possession of the property as a cultivating tenant even before the agreement of sale. He also stated that the 1st appellant is his brother and there is an enmity between him and his brother the 1st appellant/ 1st defendant in respect of the Will alleged to have been executed by his father in favour of the plaintiff. On account of such enmity the 1st appellant colluded with the 2nd defendant and brought about another agreement of sale in favour of the 2nd defendant and therefore the respondent/ plaintiff issued a notice dated 19.3.2005 to the appellants and requested the 1st appellant to execute the sale deed as per the agreement of sale dated 14.9.2004 and that notice was refused by the 1st appellant and the 2nd appellant received the notice and issued a reply notice on 25.3.2005 stating that he entered into a registered agreement of sale with the 1st appellant on 25.2.2005 and therefore he is not bound by the agreement of sale with the respondent/ plaintiff and therefore the suit was filed for specific performance of an agreement of sale.

4. The 2nd defendant filed the statement and the same was adopted by the 1st defendant. The 2nd defendant contended that the agreement of sale in favour of the respondent/ plaintiff alleged to have been executed by the 1st appellant was not true and no such agreement was executed by the 1st appellant and no amount of advance was received and the agreement dated 14.9.2004 was a forged document. The 2nd defendant came to know about the agreement in favour of the respondent/ plaintiff only after the receipt of notice from the respondent/ plaintiff and he suspected that due to some dispute between him and the 1st defendant

with regard to the price, the 1st appellant colluded with the plaintiff and made an arrangement to send the notice. He also stated that on the basis of the agreement of sale dated 25.2.2005 he purchased the suit property on 15.4.2005 under the registered sale deed and he is in possession and enjoyment of the same and the agreement relied upon by the plaintiff was anti-dated to defeat the rights of the 2nd defendant.

5. On the basis of the pleadings the trial Court framed the following issues and are as follows: (1) Whether the sale agreement dated 14.9.2004 is true and valid ?. (2) Whether the plaintiff is entitled to get a relief as prayed in the plaint ?. (3) What other relief the plaintiff is entitled for ?.

6. The trial Court held that the respondent/ plaintiff proved the execution of agreement of sale dated 14.9.2004 Ex.A1 by examining PW1 to PW3 and the agreement of sale dated 25.2.2005 Ex.B2 and the sale deed Exs.B3 and B4 were created only for the purpose of defeating the rights of the respondent/ plaintiff and answered Issue No.4 in favour of the plaintiff and also answered issue No.2 holding that the plaintiff is entitled to the relief of specific performance. The trial Court also relied upon the Finger Print Expert and held that the thumb impression found in the agreement of sale Ex.A1 is that of the thumb impression of the 1st appellant. The trial Court also held that the 2nd appellant is not a bona fide purchaser for the value and the 2nd appellant purchased the suit property after the receipt of notice of the respondent/ plaintiff and the sale deed Ex.B3 was executed immediately after the receipt of notice and therefore he cannot be considered as a bona fide purchaser for value and held that the respondent/ plaintiff is entitled to the relief of specific performance. As the agreement of sale in favour of the 2nd appellant is later in point of time and the 2nd appellant also obtained the sale deed after the receipt of notice of the respondent/ plaintiff, he is not entitled to claim any right under the sale deed.

7. The lower appellate Court framed the following points for consideration: (1) Whether the sale agreement dated 14.9.2004 is true and valid ?. (2) Whether the plaintiff is entitled to get the reliefs as prayed for in the plaint ?. (3) To what other reliefs the plaintiff is entitled ?.

8. The lower appellate Court after independently appraising various exhibits and oral evidence of the witnesses held that Ex.A1 agreement of sale dated 14.9.2004 was executed by the 1st appellant and that was proved by PW2 and PW3 and PW4 the Finger Print Expert also confirmed that the thumb impression found in Ex.A1 tallied with the admitted thumb impression of the 1st appellant and therefore the agreement of sale was executed by the 1st appellant in favour of the respondent/ plaintiff on 14.9.2004. The lower appellate Court also discussed the arguments of the appellants that the thumb impression was obtained only in the second page and not in the first page in the agreement of sale Ex.A1 and considering the explanation given by the plaintiff the lower appellate Court held that the plaintiff proved that the agreement of sale Ex.A1 was executed by the 1st appellant in favour of the respondent/ plaintiff and no steps were taken by the appellants to prove that the signature found in Ex.A1 was not that of the 1st appellant's signature. The lower appellate Court also held that the respondent/ plaintiff was ready and willing to perform his part of the contract and immediately on coming to know of the agreement of sale in favour of the 2nd appellant, he issued the notice and filed the suit. The lower appellate Court also held that the defence of the appellants that Ex.A1 must have been created to defeat the rights of the 2nd appellant as there was some dispute between the 1st appellant and the 2nd defendant over the sale consideration holding that the suit is pending in O.S.No.286 of 2005 between the plaintiff and the 1st appellant and therefore the agreement of sale could not have been created by the respondent/ plaintiff. The lower appellate Court also considered the evidence of DW1 and DW2 and held that the 2nd defendant is not a bona fide purchaser for the value and confirmed the findings of the trial Court.

9. In the grounds of appeal the appellants raised the following substantial questions of law: (1) Whether the failure to give finding by the Courts that the plaintiff has always performed or has always been ready and willing to perform the essential terms of Ex.A1 which are to be performed by him from the date of Ex.A1 till date of completion of trial vitiates the Judgments of the Courts below ?. (2) Whether Ex.A1 is inadmissible in evidence in view of the bar created under Section 17(1-A) of the Indian Registration Act ?. (3) Whether the plaintiff has proved Ex.A1 in accordance with law ?.

10. It is submitted by the learned counsel for the appellants that the Courts below erred in holding that Ex.A1 is admissible in evidence and according to the plaintiff, possession was given to him under the agreement of sale. Therefore the document Ex.A1 requires registration under Section 17(1-A) of the Indian Registration Act and admittedly Ex.A1 is not a registered document and therefore the Courts below ought not to have granted the decree on the basis of Ex.A1. He also submitted that the respondent/ plaintiff failed to prove his readiness and willingness to perform his part of the contract and the Courts below erred in holding that Ex.A1 was executed by the 1st appellant when admittedly Ex.A1 contains various additions and the thumb impression was obtained only in the second page and not in the first page and therefore the Courts below ought not to have relied upon PW1 to PW3 to arrive at a conclusion that Ex.A1 was executed by the 1st appellant. He also submitted that the evidence of PW4 cannot be relied upon as she is only an Expert and she has not given any confirmed opinion that the thumb impression found in Ex.A1 is that of the thumb impression given by the 1st appellant in Court. He also submitted that the agreement Ex.B2 is a registered agreement of sale and therefore it could not have been created to defeat the rights of the respondent/ plaintiff and though the sale deed executed in favour of the 2nd defendant after the receipt of notice, that was pursuant to the agreement of sale dated 25.2.2005 and therefore the 2nd appellant is a bona fide purchaser for value. Even assuming that Ex.A1 agreement of sale is a valid one, the plaintiff/ respondent is not entitled to the relief of specific performance as the 2nd appellant got the sale deed even prior to the filing of the suit.

11. I am unable to accept the contention of the learned counsel for the appellants. Admittedly, the 1st appellant has not filed any statement and he adopted the statement filed by the 2nd defendant. Though normally each defendant need not file separate statement and in case of common defence they can adopt the statement of other defendants, in this case the 2nd appellant in his statement made allegations against the 1st appellant and contended that the 1st appellant and the respondent/ plaintiff being brothers colluded with each other and created an agreement of sale to defeat the rights of the 2nd defendant as there was some dispute between the 1st appellant and the 2nd appellant over the sale consideration and therefore when the 2nd defendant in his statement made

allegations against the 1st appellant that the 1st appellant colluded with his brother, it is normally expected of the 1st appellant to file a separate statement. But he only adopted the statement of the 2nd defendant. Therefore, the allegation that the plaintiff and the 1st defendant colluded with each other and created an agreement of sale in favour of the plaintiff cannot be accepted.

12. Ex.A1 agreement is dated 14.9.2004 and it is signed by the plaintiff and the 1st defendant and PW2 is one of the attesting witnesses and PW3 is the scribe and both gave evidence regarding the execution of Ex.A1 and their evidence was discussed in detail by the Courts below and the Courts below held that the execution of Ex.A1 was proved by the plaintiff through PW2 and PW3 and the Finger Print Expert PW4 also confirmed that the Finger Print found in Ex.A1 in the second page is that of the Finger Print of the 1st appellant. The Courts below also held that the 1st appellant/ 1st defendant failed to prove that his signature found in Ex.A1 was not his signature by sending the same to Expert opinion along with the admitted signature. I therefore concur with the findings of the Courts below that Ex.A1 was executed by the 1st appellant in favour of the respondent/ plaintiff.

13. Ex.A1 is dated 14.9.2004 and ten months time was given for completion of sale and on 19.3.2005 on coming to know about the agreement of sale in favour of the 2nd appellant, the respondent/ plaintiff sent a notice Ex.A2 informing the appellants about the agreement of sale dated 14.9.2004 in his favour and also offered to pay the balance sale consideration. The 1st appellant refused to receive the notice and the 2nd appellant received the notice and sent reply Ex.A3 and without making any enquiry regarding the agreement of sale Ex.A1 in favour of the plaintiff he proceeded with the sale deed in his favour by obtaining the sale deed Ex.B3 on 15.4.2005. When a person having come to know about the earlier agreement of sale was projected by one person, it is normally expected to make enquiry about the earlier agreement of sale or the subsequent agreement holder must have made enquiry about the owner regarding the earlier agreement of sale. In this case no evidence was let in to that effect by the appellants. Further, a reading of Ex.B3 also makes it clear that it was without any reference to Ex.B2 the registered agreement of sale. In Ex.B3 it is stated that the entire sale consideration was paid on the date of sale deed whereas under Ex.B2 an advance amount of

Rs.10,000/- was paid and the balance will be paid on the date of execution of the sale deed. These contradictions would also create a suspicion whether the sale deed Ex.B3 was bona fide one executed by the 1st appellant in favour of the 2nd appellant or it was executed to defeat the rights of the plaintiff/ respondent. According to me, the conduct of the 2nd appellant in getting the sale deed even after the receipt of the notice from the respondent/ plaintiff, without making any enquiry either with the 1st appellant or with the respondent/ plaintiff, only leads to the conclusion that he is not a bona fide purchaser for the value.

14. Further, the trial Court rightly discussed the evidence of PW1 to PW3 and held that the agreement of sale was proved and the plaintiff was ready and willing to perform his part of the contract and I do not find any infirmity and the 1st substantial question of law is answered against the appellants holding that the Courts below held that on evidence that the respondent/ plaintiff was ready and willing to perform his part of the contract.

15. It is a specific case of the appellants that Ex.A1 is inadmissible in evidence as it is not registered and under Ex.A1 possession was given and therefore it ought to have been registered. It is seen from Ex.A1 that possession was not given under the document and it is only stated that the plaintiff is cultivating the property as the 1st appellant is residing in another District. It has not been stated that under the document possession was given to the plaintiff. In the plaint also it is only stated that as a cultivating tenant he is in possession of the property and his possession is also recognized in the agreement. Therefore, the document does not require registration and this aspect has been considered by the trial Court. Hence, the 2nd substantial question of law is also answered against the appellants. Therefore, I do not find any infirmity in the findings of the Courts below and the Judgment and Decree of the Courts below are confirmed.

16. In the result, the Second Appeal is dismissed. Consequently, the connected Miscellaneous Petition is closed. No costs. 30.09.2013 Index : Yes Internet: Yes
kr. R.S.RAMANATHAN, J.

kr To 1. The District Munsif, District Munsif Court, Sankarapuram.

2. The Subordinate Judge, Subordinate Court, Kallakurichi. S.A.No.769 of 2013 and M.P.No.1 of 2013 Dated:

30. 09-2013

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