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Court : Chennai

Decided On : Apr-15-2008

Reported in : (2008)5MLJ45

Judge : M. Jaichandren, J.

Acts : Specific Relief Act, 1963 - Sections 26 and 31; Limitation Act - Schedule - Article 96

Appeal No. : S.A. No. 348 of 1996

Appellant : Radhammal, ;palaniammal, ;dhandapani and Valliammal

Respondent : Ramalingam

Advocate for Def. : Hema Sampath, Adv.

Advocate for Pet/Ap. : K. Kannan, Adv.

Disposition : Appeal dismissed

Judgement :

M. Jaichandren, J.

1. The Second Appeal has been filed against the judgment and decree, dated 12.12.1994, made in A.S. No. 57 of 1993, on the file of the District Judge, Cuddalore, confirming the judgment and decree, dated 21.12.1990, made in O.S.

No. 1019 of 1988, on the file of the District Munsif, Cuddalore.

2. For the sake of convenience, the parties are referred to as they have been arrayed in the original suit in O.S. No. 1019 of 1988.

3. The defendants in the suit O.S. No. 1019 of 1988 are the appellants in the present second appeal.

4. The case of the plaintiff is that the suit A schedule property is a portion of survey No. 404/14, with an extent of 78 cents in Parvathipuram Village. The entire extent of property had originally belonged to one Rajagopala Chettiar and on his death the defendants, who are his wife and children, have become entitled to the same. Rajagopala Chettiar had borrowed some money from the plaintiff on a promissory note. Since Rajagopala Chettiar had not paid back the money and as he had died leaving the defendants as his heirs, the plaintiff had instituted a suit against the defendants in O.S. No. 1619 of 1982, on the file of the District Munsif, Cuddalore, and a decree had been obtained. In execution of the said decree, the plaintiff had brought the properties to sale.

5. In such circumstances, it was suggested by the defendants that they were prepared to sell the property in 'A' schedule which is the northern portion of survey No. 404/14, with an extent of 78 cents. The plaintiff had wanted to buy only the property in 'A' schedule as it had an access from the road. The plaintiff had further stated that there is a road running from west to east on the northern portion of the survey number. If the northern portion was sold and purchased by the plaintiff, he can have access to the property from the east-west road. At the same time, the remaining southern portion, which belongs to the defendants, can also be reached from the road. The defendants had suggested that they can sell 24 feet north-south on the north-western portion and 32 feet north-south on the north-eastern portion. They had said that they would use the remaining 8 feet in the north-eastern portion to have access to the remaining portion of that survey number. If the plaintiff is given any other portion it may not be possible for him to reach his property.

6. The plaintiff was also keen to purchase only the northern portion. The defendants had agreed for the same. The plaintiff had believed that the defendants would act fairly and honestly. In pursuance of the agreement, the defendants sold the property, set out in A-schedule, to the plaintiff, on 7.11.1984, for a proper and valuable consideration of Rs. 8,000/-. A sum of Rs. 6,000/- was adjusted towards the decree debt and the plaintiff had paid Rs. 2,000/- in cash. The plaintiff believed that the description of property had been correctly given as agreed between the parties. Either by oversight or otherwise, a mistake had occurred and only later the plaintiff had noticed the mistake committed in describing the properties in the sale deed. Instead of describing the property as the northern portion lying north of their remaining extent the defendants have described the property as lying south of their remaining extent. The plaintiff did not notice the mistake when the description of properties was written in the documents.

7. Only later, the plaintiff had found that the defendants had played a fraud upon him in deliberately describing the property as though it is situate south of the remaining extent in the survey number. The plaintiff is giving in 'B' schedule, the description of property as found in the sale deed which is not correct and that is not the property which was agreed to be purchased by the plaintiff and which was agreed to be sold by the defendants. On the other hand, the property in 'A' schedule alone was agreed to be purchased and agreed to be sold by the parties. Only in August, 1987, when the plaintiff went to take actual possession and demarcate the same, he found to his surprise that the description in the sale deed is not correct. Hence, the suit is filed for rectifying the instrument i.e., the sale deed, dated 7.11.1984, executed by the defendants in favour of the plaintiff by giving the description set out in 'A' schedule in the place of the description of property found in the sale deed.

8. The case of the defendants is as follows:

The plaintiff had obtained a decree in O.S. No. 1619 of 1982, on the file of the District Munsif, Cuddalore, against the defendants. The plaintiff is the brother of the 1st defendant and the maternal uncle of the defendants 2 to 4. Rajagopala

Chettiar had died in the year 1982. At that time, the third defendant was barely 17 years of age. The family of the defendants had no male help. The plaintiff, as their maternal uncle, was helping the defendants. After the decree, the plaintiff had filed an execution petition for sale of the property. As the plaintiff had suggested, the defendants were willing to sell the 'B' schedule property to the plaintiff in discharge of the decree and for cash. The defendants had agreed to sell only the 'B' schedule property.

9. One V.M. Ramalinga Chettiar, who was responsible for the transaction, had inspected the property in the presence of the plaintiff and the 3rd defendant. After inspection, the property to be sold was fixed with reference to the boundaries. At the time of inspection and the sale deed, poramboke patta was situate on the west and south. To the west of A.H. in the rough plan attached to the statement and north of A.B the land was belonging to Bakthavatchala Naidu. Recently, Bakthavatchalam had formed plots and sold them as house sites. Before the sale of the property as house sites, he had formed a road in his land situate west of A.H. The said road commenced from A-E-1 in the plan and extended towards west.

10. In pursuance of the negotiations and inspection, on 7.11.1984, the sale deed was executed and registered, on 8.11.1984 and the plaintiff took possession of the property and is in enjoyment of the same. The remaining northern 70 cents is in possession of the defendants. The plaintiff is aware of it. The plaintiff was never willing to purchase 24 feet north-south on the north-eastern portion and 32 feet north-south in the north- eastern portion. It is not correct that the plaintiff had wanted to buy only 'A' schedule property. 'B' schedule property has access on both sides. The defendants had never played any fraud upon the plaintiff. Only 'B' schedule property was agreed to be sold to the plaintiff.

11. In July, 1987, the defendants and one Kaliamoorthi entered into an agreement to sell, in respect of the northern 70 cents. In pursuance of that, the 3rd defendant and Kaliamoorthy measured the property, demarcated the plots and wanted to put up survey stone. Coming to know of it, the plaintiff, with ulterior motive, had caused trouble to the defendants and had issued a notice to them. The defendants

are in possession and enjoyment of 70 cents, except the 'B' schedule property. The defendants are not bound to execute the rectification deed.

12. Based on the averments made on behalf of the plaintiff as well as the defendants, the following issues were framed for consideration:

(i) Whether the claim of the plaintiff that he had purchased the 'A' schedule property as described in the plaint is correct?

(ii) Whether the claim of the defendants that they had purchased the 'B' schedule property is correct?

(iii) Whether the defendants had prayed for time for the rectification of the sale deed?

(iv) Whether the suit is barred by the law of limitation?

(v) Whether the plaintiff is entitled to the relief of mandatory injunction as prayed for in the suit?

(vi) To what other reliefs, the plaintiff is entitled to?

13. With regard to the first issue, the trial Court had come to the conclusion that the claim of the plaintiff that he had purchased only the 'A' schedule property is acceptable. Therefore, the claim of the defendants that the plaintiff had purchased only 'B' schedule property is incorrect. The trial Court had also held that the suit is not barred by the law of limitation as claimed by the defendants and that the defendants are liable in law to rectify the mistake that had happened in the sale deed, dated 7.11.1984, marked as Exhibit A.1, as prayed for by the plaintiff. The trial Court had also held that the plaintiff did not have any passage or pathway to the 'B' schedule property alleged to have purchased from the defendants. The trial Court had also come to the conclusion that the defendants had fraudulently shown the 'B' schedule property in the sale deed, dated 7.11.1984, marked as Exhibit A.1, instead of the 'A' schedule property which the plaintiff had actually intended to purchase.

14. Since the trial Court had decreed the suit in O.S. No. 1019 of 1988, as prayed for by the plaintiff, by its judgment and decree, dated 21.12.1990, the defendants had filed an appeal in A.S. No. 57 of 1993, before the District Judge of South Arcot Vallalar, Cuddalore.

15. Having framed the points for consideration as to whether the plaintiff is entitled for the relief of rectification of the sale deed, 7.11.1984, the first appellate Court had found, from the evidence of P.W.1, that since the defendants were not in a position to pay the amount due from them on a pronote, the plaintiff had obtained a decree and had brought the suit property for sale. The defendants had agreed to sell 8 cents on the northern side, adjacent to the existing pathway. Accordingly, a sale deed, dated 7.11.1984, had been executed. The description of the property in the said sale deed related to the 'B' schedule property, instead of the A schedule property, which the plaintiff had intended to purchase. The defendants had fraudulently shown the description of the B schedule property in the sale deed instead of the A schedule property.

16. In the sale deed, dated 7.11.1984, the property described was 8 cents of land out of 78 cents in S. No. 404/14. The first appellate Court had also found from the evidence of D.W.1 that there was nothing to show that the 8 cents of land said to have been purchased by the plaintiff, in accordance with the sale deed, dated 7.11.1984, could be accessed from Bakthavatchalam's property. There were no documents to show that there was a street that could be used to reach the plaintiff's property. Even the evidence adduced by D.W.2 had shown that 8 cents in the Northern side of the property was sold to the plaintiff and there was a pathway to reach the same. From the plan filed by the Commissioner, it was seen that there was no pathway to reach the southern portion of the property described in the sale deed. Thus, the first appellate Court had come to the conclusion that the property the plaintiff had intended to purchase was 8 cents of land in the northern portion of the defendants' property.

17. With regard to the question of limitation, the first appellate Court had held that the plaintiff had filed the suit within 3 years from the date of knowledge of the mistake in the sale deed, dated 7.11.1984. Since the suit was filed by the plaintiff,

within three years from the date of knowledge of the mistake in the sale deed, the suit was within time and therefore, it was not barred by law of limitation. Therefore, the first appellate Court had, by its judgment and decree, dated 12.12.1994, confirmed the judgment and decree of the trial Court.

18. Aggrieved by the judgment and decree of the Courts below, the defendants had filed the present second appeal before this Court.

19. The second appeal had been admitted on the following substantial question of law:

1. Whether the Courts below misconstrued the entire evidence adduced in this case, while concurring their views in decreeing the suit?

20. Mr.K.Kannan, the learned senior counsel appearing for the appellants had submitted that both the Courts below had erred in coming to the conclusion that the suit filed by the plaintiff was within time and not affected by the law of limitation. He had also contended that according to Section 26 of The Specific Relief Act, 1963, a suit for rectification could be filed on the ground of fraud or on the ground of mutual mistake. In the present case, both the grounds are not available to the plaintiff, since the plaintiff has not shown that the defendants had committed fraud in describing the 'B' schedule property, which is the southern portion of the property belonging to the defendants, instead of the 'A' schedule property, which is the northern portion of the defendants' property. Except the sale deed, dated 7.11.1984, marked as Exhibit A.1 and the notice issued by the counsel for the plaintiff, dated 14.9.1987, marked as Exhibit A.2, to the defendants and the reply notice sent by the defendants through their counsel, dated 30.9.1987, marked as Exhibit A.3, no other documents had been filed on behalf of the plaintiff to prove fraud.

21. Further, the plaintiff has not shown that the defendants were in a dominant position in relation to the plaintiff to substantiate that the description of the property in the sale deed, dated 7.11.1984, was done fraudulently. The claim of the plaintiff that he had learnt about the fraud alleged to have been committed by the defendants only in the month of August, 1987, when he had taken possession of

the property, cannot be true. No independent witness had been examined in support of the claims made by the plaintiff in this regard. Even though it is seen from the Commissioner's Report that there is a pathway on the southern side of the property purchased by the plaintiff, the plaintiff has been wrongly claiming that he has no access to the 'B' schedule property which he has purchased under the sale deed, dated 7.11.1984.

22. The learned senior counsel appearing for the appellant had relied on the following decisions in support of his contentions:

22.1. In Marappureddigari Sayamma and Anr. v. R. Venkata Reddi and Ors. LXI MLJ 437, it was held that 'one test which equity applies in a suit for rectification is 'Is the proof of error clear and conclusive?' One defence equity allows is laches. Equity will not relieve him who tarries on the way. One bias equity always shows in such matters, viz., a bias in favour of the evidence given by the other party to the instrument; that is to say, the burden of proof lies heavily on the person seeking rectification.'

22.2. In Siddique & Co. v. Utoomal & Assudamal Co. , it was held that in order to obtain rectification of an instrument under Section 31 it must be proved that it was through a mutual mistake of the parties that the instrument in question did not truly express the intention of the parties; and the duty of the Court, before it can rectify, is to find it clearly proved that there has been mistake in framing the instrument, and it must ascertain the real intention of the parties in executing the instrument. On being satisfied of those two elements, it is in the discretion of the Court to grant rectification.

22.3. In Rajaram v. Manik A.I.R. (39) 1952 NAG 90, it was held that the power which the Court possesses of reforming written agreements where there has been an ommission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake, should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description. A person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most

satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement.

22.4. In Chenchulakshmi v. Janardan Singh 2000 (I) MLJ. 349, it was held that it is simply not enough to employ the general expression 'fraud and collusion', for, they are insufficient even to amount to an averment of fraud of which the court can take notice of. When a plaintiff seeks relief on the ground of fraud without giving particulars of fraud, he cannot hope to succeed in the case.

22.5. In Veronica Thomas Rajkumar v. Joseph John Peter Sandy (2004) 1 M.L.J. 301, it was held that the principles underlying the rectification of instruments are governed by Section 26 of the Specific Relief Act. Generally a party to a written instrument is not allowed to contradict the instrument, but where it is contended that the instrument does not reflect the real intention because of fraud or mutual mistake, party may get the instrument rectified under Section 26 of the Specific Relief Act. This is the relief in equity.

23. Per contra, Mrs. Hema Sampath, the learned senior counsel appearing for the respondent had submitted that the Courts below were right in coming to the conclusion that the suit filed by the plaintiff for rectification of the sale deed, dated 7.11.1984, was not affected by the law of limitation and that the description of the property sold through the said sale deed was done in a fraudulent manner.

24. The learned senior counsel appearing for the respondent had also relied on the following decisions in support of her contentions:

24.1. In Parikh Atmaram v. Bai Hira , it was held that when the ground for setting aside the instrument is that the plaintiff did not appreciate its true nature and legal consequences, the limitation begins to run from the date when the plaintiff became aware of the true nature and legal consequences of the instrument.

24.2. In Noorudin v. Mahomed Umar , it was held that mere laches is not a bar to a suit for rectification of deed on ground of mutual mistake if the rights of third parties have not intervened. The date of the notice of the mistake is the date from which time runs.

24.3. In Balasundara Pandiam Pillai v. Authimulam Chettiar A.I.R. 1919 MAD 679 (1), it was held that in a suit for cancellation of a document time will begin to run from the time when plaintiff becomes aware of facts which create in him a reasonable apprehension that he will suffer injury if the document be left outstanding.

24.4. In Ningawwa v. Byrappa Shiddappa Hireknrabar and Ors. : [1968]2SCR797 , it was held that a contract or other transaction induced or tainted by fraud is not void, but only voidable at the option of the party defrauded. Until it is avoided, the transaction is valid, so that third parties without notice of the fraud may in the meantime acquire rights and interests in the matter which they may enforce against the party defrauded. The legal position will be different if there is fraudulent misrepresentation not merely as to the contents of the document but as to its character. With reference to the former, the transaction is void, while in the case of the latter, it is merely voidable.

24.5. In Tetali Sooramma v. Kovvuri Venkayya A.I.R. 1938 MAD 589, it was held that where the plaintiff suing for sale of certain property on the basis of a mortgage executed in his favour, alleges that the property is wrongly described and incidentally prays for rectification of the mistake, he is entitled on proof of his title to the relief for sale of the property which was agreed to be morgaged, even though his right to sue for rectification of the mortgage deed is barred by limitation. Article 96, of the Limitation Act has no application to such a case. No question of limitation arises as the substantial relief prayed for by the plaintiff is not rectification of the deed, but some other relief which the plaintiff is entitled to claim under the law on the basis of the transaction which he seeks to enforce.

25. On analysing the rival contentions raised on behalf of the parties concerned and on a perusal of the records available, this Court is of the considered view that there is nothing shown on behalf of the appellants for this Court to interfere with

the concurrent findings of the Courts below as held by the Supreme Court in Gurdev Kaur and Ors. v. Kaki and Ors. : AIR 2006 SC1975 . Relying on the evidence available, both the trial Court as well as the first appellate Court have come to the conclusion that there was an element of fraud in the description of the property intended to be purchased by the plaintiff in the suit in O.S. No. 1019 of 1988, on the file of the District Munsif, Cuddalore. The Courts below had found that there was no access to the B schedule property which the plaintiff is said to have purchased. Further, the Courts below had found that the suit filed by the plaintiff, praying for the relief of rectification of the sale deed, dated 7.11.1984, is within time as it was not affected by the law of limitation, since it had been filed within three years from the date of knowledge of the mistake that had happened in the description of the property in the sale deed, dated 7.11.1984.

26. With regard to the substantial question of law raised by the appellant relating to the aspect of mutual mistake, it is seen that the term 'mutual mistake' is used by Anson in his work on the 'law of contract' as a 'synonym' for common mistakes. Cheshire uses the term in a different sense. According to him, a mutual mistake arises when the parties misunderstand each other. They are not making the same mistake but each is mistaking what the other is offering or accepting. If the mutual mistake relates to the matter of fact essential to the agreement, the contract is void as held in Raffles v. Wichethaus (1864) 159 E.R.375 and Smith v. Hughes (1871) 6 Q.B. 597. Since genuine consensus would be lacking, no contract really comes into existence.

27. In such circumstances, the substantial question of law arising for consideration in the present second appeal is answered in favour of the respondent. Accordingly, the second appeal stands dismissed confirming the judgment and decree of both the Courts below. No costs.

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