



S.A.No.721 of 2013

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.08.2023

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN

S.A.No.721 of 2013

and

M.P.No.1 of 2013

1.M.Palaniyappan (died)

2.M.Muthammal

3.P.Mariammal

4.P.Dharani

5.S.Menaka

6.P.Gowsik

[Sole appellant died, A2 to A6 B/R as LR's of the deceased sole appellant viz., M.Palaniyappan vide Court order dated 16.08.2022 made in CMP. Nos.13462, 13463 & 13566 of 2022 in SA.No.721 of 2013 (TVTSJ)]

...Appellants

Vs.

Savithri

...Respondent

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree of the learned Subordinate Judge, Namakkal dated 20.12.2012 made in A.S.No.1 of 2012 reversing the well



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considered judgment and decree of the Principal District Munsif Court, Namakkal dated 23.06.2011 made in O.S.No.299 of 2004 (previously O.S.No.355 of 1998, Sub Court, Namakkal).

For Appellants : Mr.D.Baskar

For Respondent : Mr.R.V.Agilas
for Mr.C.Jagadish

J U D G M E N T

The unsuccessful respondent in A.S.No.1 of 2012/plaintiff in O.S.No.299 of 2004, who lost the suit for specific performance is on appeal.

2. The brief facts of the case are as follows:-

i) The suit was laid by the appellant herein seeking specific performance of the sale agreement dated 13.03.1996. According to the plaintiff, the defendant had agreed to convey the subject property for a consideration of Rs.45,000/-. An agreement was entered into between them on 13.03.1996, on which date, a sum of Rs.40,000/- was paid as advance, leaving a balance of Rs.5,000/-. A period of two years was fixed for payment of the balance sale consideration and for



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performance of the contract. According to the plaintiff, since his demand for execution of the sale deed was not acceded to, by the defendant, he sent a legal notice on 20.03.1998 which was served on the defendant. Since the defendant did not come forward to execute the sale deed, despite such demand, the plaintiff has lodged the suit on 13.07.1998.

ii) The suit was resisted by the defendant contending that the agreement was not intended to be acted upon as a sale agreement but it was only executed as security for a loan transaction. According to the defendant the very fact that two years period was fixed for payment of the negligible sum which is just about 10% of the total sale consideration would by itself demonstrate that the agreement was not intended to be acted upon as an agreement of sale but only executed as security for the loan transaction. The possession of the original sale deed of the suit property by the plaintiff was pointed out as an indicator to conclude that the suit agreement was not intended to be a sale agreement.

iii) On the above pleadings, the trial Court framed the



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following issues:-

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- “1. பிரதிவாதி, வாதியிடம் பெற்றுக்கொண்ட ரூ.50,000 கடனுக்காக செக்யூரிட்டியாகத்தான் 13.03.1996-ம் தேதியில் கிரைய ஒப்பந்த பத்திரம் எழுதிக்கொடுத்துள்ளாரா?
2. வாதி கிரைய ஒப்பந்த பத்திரத்தின்படி கிரையம் செய்துகொள்ள எப்பொழுதும் தயாராக இருந்துள்ளாரா?
3. வாதி வழக்கில் கோரியுள்ளபடி ஏற்றதை ஆற்றுக பரிகாரம் பெற அறுகதை உடையவரா?
4. வேறு என்ன பரிகாரம்?”

iv) At trial, the plaintiff examined himself as P.W.1 and scribe of the agreement/Ex.A1 namely, Mr.Rajan was examined as P.W.2 and exhibits viz., Ex.A1 to Ex.A4 were marked on the side of the plaintiff. On the side of the defendant, the defendant's husband was examined as D.W.1 and one of the attestor to the agreement was examined as D.W.2 and one Ganesan was examined as D.W.3 to establish the value of the property. No document was produced on the side of the defendant.



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v) The learned District Munsif, Namakkal, who tried the suit, on consideration of the evidence on record, rejected the plea of the defendant and concluded that the suit agreement was intended to be acted upon as a sale agreement and the plaintiff was always ready and willing to perform his part of the contract. On the above findings, the learned District Munsif, Namakkal had decreed the suit.

vi) Aggrieved, the defendant preferred an appeal in A.S.No.1 of 2012 on the file of the Sub Court, Namakkal. The learned Subordinate Judge on a consideration of the agreement and the evidence of D.W.2, which he chose to believe, concluded that the suit agreement was not intended to be a sale agreement. He took into account the fact that major portion of the sale consideration was paid on the date of agreement and an unusually long period of two years was fixed for payment of the negligible balance amount. The failure of the plaintiff to examine the attesor to the document was also pointed out by the learned Subordinate Judge as a reason to conclude that the contract was not to be acted upon as an agreement of sale. The learned Subordinate Judge also found that the plaintiff was not ready and willing to perform his part of the contract. The learned



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Subordinate Judge has arrived at the said conclusion by taking into account the evidence of P.W.1. On these reasonings, the learned Subordinate Judge allowed the appeal and dismissed the suit. Hence this second appeal.

3. The following questions of law were framed by this Court at the time of admission of the present appeal:-

"1) Whether the lower appellate Court being the final Court to appreciate the pleadings and evidence available on records, is correct in law in misappreciating the same when the appellant/plaintiff had established his readiness and willingness to perform his part of the sale agreement?"

2) When the appellant /plaintiff had categorically pleaded in the pre-suit notice, plaint and evidence about his readiness and willingness to perform his part of the sale agreement and when the same was established in accordance with law, whether the Lower Appellate Court is correct in law in non-suited the appellant/plaintiff on that sole ground?"



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3) Whether the lower appellate Court is correct in law in not drawing an adverse inference against the respondent/defendant when the pleading of alleged loan transaction was not proved by the respondent/defendant in the manner known to law?"

4. The Lower Appellate Court has considered the evidence and has arrived at the conclusion that the plaintiff was not ready and willing to perform his part of the contract. The admission made by the plaintiff in the cross examination to the effect that he had not stated that he was not ready and willing to perform his part of the contract in his proof affidavit was relied upon.

5. Mr.D.Baskar, learned counsel for the appellant/plaintiff would vehemently contend that this finding of the learned Appellate Judge is wrong. He drew my attention to the contents of the proof affidavit of P.W.1, wherein it has been specifically stated as follows:-

“...நான் மேற்படி கிரைய ஒப்பந்தப்படி மேற்படி
ஒப்பந்த தேதி ஏற்பட்ட முதல் அன்று முதல்
இன்று வரை ஏற்றுதலை ஆற்றுவதற்கு



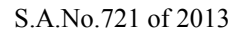
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தயாராக இருந்து வருகிறேன். ..."

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According to the learned counsel for the appellant, this evidence has been overlooked by the learned Subordinate Judge and he has chosen to extract the cross examination which is in the form of suggestion. I have gone through the evidence of P.W.1 and his evidence in cross examination also. I do not think that the conclusion of the Lower Appellate Court to the effect that the plaintiff has stated nothing about his readiness and willingness in the affidavit of proof filed by him as P.W.1 could be sustained. Obviously, the learned Appellate Judge has only looked at the cross examination where there is an admission which runs counter to the claim made in the affidavit. Therefore, I am of the considered opinion that the plaintiff cannot be non suited on the ground that he was not ready and willing to perform his part of the contract. In the light of the above conclusion, the question Nos.1 and 2 are answered in favour of the appellant.

6. Adverting the defence that the suit agreement was executed for securing the loan transaction and the same was not intended to be an agreement of sale, law is now well settled to the effect that such a plea is open to the defendant in a suit for specific



iii) It is not known under what circumstance a period of four months had been stated for complying with the terms of contract.



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iv) Plaintiff claims that he was put in possession of the property which appears to be incorrect. There is no evidence to prove the said fact.

v) Plaintiff is a person who does not know to read Malayalam, but still the agreement is executed in Malayalam.

vi) The agreement is written by PW3 who is an interested party to the transaction. He claims to have received commission from both the parties which is not the practice followed in such situations.

vii) Defendant has a contention that his intention was only to get a loan for which he had signed certain papers. But he further states that he did not receive the loan. According to him, he had not received any amount from the plaintiff which of course we don't agree.

viii) The actual amount paid by the plaintiff to defendant can only be discerned from the agreement, the genuineness of which is doubted by the defendant.



ix) Exts.A5 and A5(a) though had been relied upon by the Court below, the manner in which the said documents are executed and the purpose is doubtful.

x) The intention of the defendant was to sell only one item of property as is evident from Exts.B1 and B2 advertisements. The advertisements were published on 1st January, 2005. A person who is in dire need of finances will either sell his property or he may take loan. Taking into account the factual circumstances, it is possible that a loan was arranged by the plaintiff for which a document in the nature of Ext.A1 was prepared."

7. If we to test the case of the appellant/plaintiff on the above principles approved by the Hon'ble Supreme Court, we find that the appellant/plaintiff has satisfied more than one of the circumstances viz.,

1) Major portion of the sale consideration has been paid on the date of agreement leaving just about 10% of the as balance payable;

2) An unusually long period of two years has been fixed for the balance sale consideration i.e., a negligible sum of Rs.5000/-;



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3) The original document relating to the property was handed over to the plaintiff; and

4) The plaintiff offers to pay the balance of sale consideration of Rs.5000/- almost at the end of two years.

8. All these four factors taken cumulatively would conclusively establish that the suit agreement was not intended to be an actual sale agreement. The learned Appellate Judge has chosen to believe the evidence of D.W.2, who is the defendant's husband's brother. Being one of the attesting witness, he has very clearly stated that it was executed only as security for the loan transaction. His evidence has been not been shaken in cross examination. There are two attesting witnesses to the suit agreement. The appellant/plaintiff has not chosen to examine the other attesting witness. P.W.2 / scribe has admitted that the negotiations for the agreement did not take place in his presence and he does not know the original agreement between the parties. In the light of the above findings, I am unable to find fault with the Lower Appellate Court for having come to the conclusion that the suit agreement was not intended to be acted upon as an agreement of sale and it was executed as security for the loan



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transaction. The third question of law therefore has to be answered to the effect that there is no occasion for the appellate Court to draw adverse inference against the defendant and it has been proved that the suit agreement was not intended to be acted upon as a sale agreement. In view of the said conclusion, the appeal fails and it is accordingly dismissed. Consequently, connected Miscellaneous Petition is closed. There shall be no order as to costs.

10.08.2023

DP

Internet:Yes

Index:No

Order : Speaking

Neutral Citation : No

To

1.The Sub Court,
Namakkal.

2.The Principal District Munsif,
Namakkal.



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R.SUBRAMANIAN, J.

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