

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 05.11.2015

CORAM

THE HON'BLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.171 of 2009

and

M.P.Nos.1 of 2009

and

M.P.No.1 of 2015

V.P.Murugesan

...Appellant/Respondent/
Plaintiff

Vs.

P.Shiek Mideen

..Respondent/Appellants/
Defendant

Prayer:- This Second Appeal has been filed under Section 100 of Civil Procedure Code against the judgment and decree on the file of the learned Additional District Judge Fast Track Court No.III, Dharapuram in A.S.No.56 of 2007 dated 24.10.2008 in reversing the judgment and decree of the learned District Munsif, Dharapuram in O.S.No.384 of 2004 dated 17.10.2006.

For Appellant : Mr.V.Ragavachari

For Respondent : Mr.A.K.Kumaraswamy

JUDGMENT

The plaintiff in O.S.No.384 of 2004 on the file of the learned District Munsif, Dharapuram is the appellant herein. The respondent is the sole plaintiff in the suit. The said suit was filed by the plaintiff seeking a decree for specific performance and to direct the defendant to execute a sale deed in respect of the suit property in favour of the plaintiff in terms of the sale agreement dated 13.05.2002 executed bilaterally between the plaintiff and the defendant. The suit was decreed as prayed for by the trial Court by decree and judgment dated 17.10.2006. As against the same, the defendant filed an appeal in A.S.No.56 of 2007 on the file of the learned Fast Track cum District Munsif,

Dharapuram. By decree and judgment dated 24.10.2008, the first appellate Court allowed the appeal and set aside the decree and judgment of the trial Court and dismissed the suit. As against the same, the plaintiff has come up with this second appeal.

2. During the pendency of the second appeal, the appellant has filed M.P.No.1 of 2015 seeking to amend the prayer in the plaint to include the prayer for alternative relief of refund of advance of sale consideration paid under the sale agreement in question along with interest @ 18% per annum.

3. The case of the plaintiff is as follows:- Admittedly, the suit property belongs to the defendant. On 18.05.2000, the plaintiff and the defendant had entered into a sale agreement, by which, the defendant agreed to sell the suit property to the plaintiff for a total consideration of Rs.60,000/-. A sum of Rs.50,000/- was paid as advance. The balance of sale consideration was Rs.10,000/-. According to the plaintiff, within the time stipulated, the plaintiff was not able to pay the balance sale consideration of Rs.10,000/-, so as to get the sale completed in his favour. Therefore, on 13.05.2002, the earlier registered sale agreement dated 18.05.2000 was cancelled and instead, a fresh sale agreement was entered into between the defendant and the plaintiff, in respect of the very same suit property, by which, the defendant again agreed to sell the suit property to the plaintiff for a sale consideration of Rs.60,000/-. This time, a sum of Rs.35,000/- was paid by the plaintiff on 13.05.2002 towards advance. The balance sale consideration was Rs.25,000/-. It was agreed that on payment of the said amount of Rs.25,000/- by the plaintiff, the defendant should execute a sale deed in favour of the plaintiff, thereby conveying the suit property to him. But, though the plaintiff was all along ready and willing to perform his part of contract, the defendant did not come forward to execute the sale deed in favour of the plaintiff, after receiving the balance of sale consideration. Therefore, the plaintiff issued a legal notice on 30.04.2004, calling upon the defendant to receive the balance of sale consideration and to execute the sale deed in favour of the plaintiff. Though, the said notice was received by the defendant, as early as on 01.05.2004, the defendant did not come forward to perform his part of contract nor did he send any reply to the plaintiff. Therefore, the plaintiff filed the present suit for specific performance.

4. In the written statement, the defendant contended that there was no such agreement at all entered into between him and the plaintiff and the defendant never agreed to sell the suit property to the plaintiff. According to the specific case of the defendant, it was only a loan transaction. On 13.05.2002, the defendant approached the plaintiff to lend a sum of Rs.35,000/- as loan. Accordingly, the plaintiff paid a sum of Rs.35,000/-

towards loan but, instead of getting a document executed by the defendant pertaining to the loan transaction, he wanted the defendant to execute a sale agreement and accordingly, the sale agreement in question was executed. It was specifically contended that though the said document was executed, there was no consensus ad idem between the parties to treat the same as a sale agreement.

5. It is further stated in the written statement that though the defendant was ready to repay the said amount of Rs.35,000/-, the plaintiff did not come forward to receive the same. While so, the plaintiff issued a legal notice on 30.04.2004 calling upon the defendant for the first time to execute a sale deed in his favour treating the above document as sale agreement. For the said notice, the defendant issued a reply notice on 08.06.2004, wherein, he has specifically stated that though the said document was executed, it was never intended by the parties to treat the same as a sale agreement.

6. Based on the above pleadings, the trial Court framed appropriate issues. In order to prove the case, on the side of the plaintiff, he was examined as P.W.1 and one Mr.G.Ganesan was examined as P.W.2 and as many as 5 documents were exhibited. On the side of the defendant, the defendant was examined as D.W.1 and one Mr.Abdul Majid was examined as D.W.2 and as many as 4 documents were exhibited.

7. Having considered all the above, the trial Court decreed the suit as prayed for. But, the first appellate court reversed the same. That is how, the appellant is now before this Court with the present second appeal.

8. As I have already pointed out, now, the appellant has come up with a miscellaneous petition in M.P.No.1 of 2015 in S.A.No.171 of 2009 seeking to amend the plaint so as to include the prayer to direct the defendant to return the advance money of Rs.35,000/- paid under the agreement in question together with interest at 18% per annum from the date of agreement namely, 13.05.2002 till the date of repayment.

9. I have heard the learned counsel for the appellant and the learned counsel for the respondent both in the second appeal as well as in M.P.No.1 of 2015 and I have also perused the records carefully. This second appeal has come up today for admission.

10. In this second appeal, the following substantial questions of law have arisen for consideration:-

(1) Whether the first appellate court was right in dismissing the suit declining to grant a decree for specific performance of contract of sale notwithstanding the fact that the execution of Ex.A1 has been admitted by the defendant?

(2) Whether the first appellate court was right in holding that there was no sale agreement entered into between the parties and Ex.A.2 was never intended to be performed when the defendant has not proved that Ex.A.1 relates to loan transaction?

11. The learned counsel appearing for the appellant would submit that since the defendant has admitted the due execution of Ex.A.1, the first appellate court ought not to have reversed the decree granted by the trial court in favour of the appellant. But the said argument does not persuade me at all. The defendant has not disputed that he signed the document (Ex.A.1) and he was a party to the registration. The question is whether this admission would amount to due execution of Ex.A.1 or not. The defendant has stated in his evidence that he never intended to sell the suit property to the plaintiff. He has further stated in his evidence that he borrowed a sum of Rs.35,000/- as loan from the plaintiff and according to his money lending practice the plaintiff took him to the Registrar's office and got Ex.A.1 executed. According to him, there was no consensus ad idem between the parties to treat the same as a sale agreement.

12. The contention of the learned counsel for the appellant is that the defendant has not proved the loan transaction and thus, the first appellate court ought to have treated Ex.A.1 as a duly executed sale agreement. In this regard, I may state that the defendant, in clear terms in his evidence, has stated that he borrowed a sum of Rs.35,000/- as loan only and in connection with the same, Ex.A.1 was executed. But, P.W.1 and P.W.2 have stated in their evidence that Ex.A.1 was intended to be performed and there was agreement between the parties to sell the property by the defendant to the plaintiff. Now, we have to appreciate these oral evidence as to which version is true. This can be done by analyzing the circumstances under which this document came to be executed. It is not in dispute that on an earlier occasion, that was on 18.05.2000, in respect of the very same suit property, a sale agreement was executed by the defendant to the plaintiff thereby agreeing to sell the suit property for Rs.60,000/-. According to the plaintiff, a sum of Rs.50,000/- was paid as advance under the sale agreement and the balance of sale consideration to be paid was Rs.10,000/- But, that sale agreement was not performed. Subsequently, Ex.A.1

came to be executed on 13.05.2002. In para 3 of the plaint, it is the specific case of the plaintiff that he did not have the balance sale consideration of Rs.10,000/- to pay the same to the defendant and get the sale completed in his favour. It was because of that reason, the sale agreement dated 18.05.2000 was cancelled. But, strangely, in Ex.A.1, which was executed on the same day, it is stated that a sum of Rs.35,000/- was paid as advance as per the terms of the sale agreement. The first appellate court has correctly analyzed this fact and has come to a right conclusion that when it is the positive case of the plaintiff that he did not have Rs.10,000/- to pay to the defendant and to get the sale completed in his favour on 13.05.2002, it is not explained to this court as to how he could pay Rs.35,000/- to the defendant on the same day simultaneously. The earlier sale agreement was for Rs.60,000/- and Ex.A.1 Sale Agreement is also for Rs.60,000/- and under the earlier sale agreement, a part of sale consideration of Rs.50,000/- had been paid to the defendant. If that be so, the same should have been mentioned in Ex.A1. But, Ex.A1 reads as though a sum of Rs.35,000/- was afresh paid to the defendant. It is not explained to the court by the plaintiff as to what had happened to Rs.50,000/- which was already paid by the plaintiff to the defendant under the earlier sale agreement. Further, it is not explained to the court as to what was the need for executing a fresh sale agreement when the earlier sale agreement was not even time barred. These facts have not been explained by the plaintiff. From these facts, the first appellate court has come to the right conclusion that the plaintiff was a money lender and it was his practice to get a sale agreement executed as and when money was lent. From the above factual back ground and the circumstances, the first appellate court has believed the evidence of D.W.1 rightly. Thus, I hold that the defendant has proved that Ex.A.1 was not executed with the intention to treat the same as a sale agreement.

13. The learned counsel for the appellant would submit that Section 92 of the Evidence Act is a bar for the defendant to lead evidence contrary to the terms of Ex.A.1. This argument deserves to be simply rejected for the simple reason that as per the proviso to Section 92 of the Evidence Act, any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto: such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law. Here, in the instant case, what the defendant had stated in his evidence is that there was no due execution of a sale agreement for want of consensus ad idem. It is also his case that there was no consideration paid in pursuance of any such agreement of sale under Ex.A.1. The learned counsel for the appellant would submit that the payment of Rs.35,000/- has been admitted by the

defendant and thus, there is no failure of consideration. This argument also cannot be accepted because though a sum of Rs.35,000/- was paid it was not by way of consideration under the sale agreement. It was paid only as a loan. Therefore, the defendant had a legal right to lead evidence in respect of these two aspects to assail Ex.A.1. Therefore, this argument of the learned counsel for the appellant is rejected.

14. The learned counsel for the appellant would next contend that though there was no relief sought for repayment of advance money, the court could suo motu direct for repayment of the same with interest. In order to substantiate his contention, the learned counsel has relied on a few judgments of the Hon'ble Supreme Court. I do not want to reproduce the same. Regarding the said legal position, I do not have any different opinion. I do agree that this court has got suo motu power to order for repayment of advance money paid under the sale agreement to the plaintiff even in the absence of any specific relief sought for in this respect. In my considered view that course is possible only in a case where the court finds that there was a validly executed sale agreement, but, this court declines to grant a decree for specific performance of contract. It is only in such event, instead of granting a decree for specific performance, the court could direct the defendant to repay the advance money paid under the sale agreement. But, here in the instant case, as I have already pointed out there was no such sale agreement at all entered into between the parties. Ex.A.1 was never intended to be performed. Therefore, the prayer for directing the defendant to repay Rs.35,000/- that too with interest to the plaintiff is out of consideration. Since this court concurs with the first appellate court that a sum of Rs.35,000/- was paid only as loan, it is always open for the plaintiff to recover the same by instituting appropriate proceedings, if he is so legally entitled to do, subject to the limitation period. Therefore, M.P.No.1 of 2015 is also liable to be dismissed.

15. In view of the foregoing discussion, I do not find any merit at all in the second appeal and I answer both the substantial questions of law against the appellant. Thus, the second appeal must fail.

16. In the result, the second appeal is dismissed. M.P.No.1 of 2015 is also dismissed. The judgment and decree dated 24.10.2008 made in A.S.No.56 of 2007 by the learned Additional District and Sessions Judge, Fast Track Court No.III, Dharapuram, is confirmed. Consequently, M.P.No.1 of 2009 is closed. There shall be no order as to cost.

-s/d-

Assistant Registrar(CSVII)

dt:20/01/2016

True Copy

Sub-Assistant Registrar

To

- 1.The Addl. District, Fast Track Court No.III, Dharapuram.
- 2.The District Munsif, Dharapuram.

+1 cc to Mr.V.Raghavachari Advocate sr.60992

+1 cc to Mr.A.K.Kumarasamy Advocate sr.60965

Second Appeal No.171 of 2009

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