

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18.12.2015

CORAM:

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.315 of 2015 and M.P.No.1 of 2015

1. K.Ghewarchand

2. P.Rajesh

.. Appellants/ 1st and 2nd Defendant

-Vs-

Rani

.. Respondent/ Plaintiff

SECOND APPEAL filed under Section 100 of Code of Civil Procedure against the judgment and decree dated 10.11.2014 made in A.S.No.41 of 2013 on the file of the Principal District Judge, Thiruvallur by confirming the judgment and decree dated 30.07.2011 made in O.S.No.77 of 2007 on the file of the Subordinate Judge, Thiruvallur.

For Appellants : Mr.I.Rathinavel

For Respondent : Mr.M.S.Subramanian

J U D G M E N T

The defendants in O.S.No.77 of 2007 on the file of the learned Subordinate Judge, Thiruvallur are the appellants herein. The sole plaintiff in the suit is the respondent. The respondent filed the said suit for specific performance of contract of sale. The trial court, by decree and judgment dated 30.07.2011, decreed the suit as prayed for. As against the same, the 1st appellant/1st defendant in the suit alone filed an appeal in A.S.No.41 of 2014 on the file of the learned Principal District Judge, Thiruvallur. The 2nd defendant was shown as the 2nd respondent in the First Appeal. The respondent herein/the plaintiff was the 1st respondent in the First Appeal. By decree and judgment dated 10.11.2014, the learned Principal District Judge, Thiruvallur dismissed the appeal thereby confirming the decree and judgment of the trial court. Challenging the same, now the appellants are before this Court with this Second Appeal. Though the 2nd defendant herein was only the 2nd respondent in the First Appeal, he has also joined with the 1st appellant to file the present Second Appeal.

2. This Second Appeal has come up today for admission. On caveat, the respondent has made appearance through her Counsel. I

have heard the learned Counsel for the appellants and the learned Counsel for the respondent. I have also perused the records carefully.

3. The case of the plaintiff in brief is as follows:

The 1st defendant/1st appellant is the owner of the suit property which is a house site. The plaintiff entered into a sale agreement with the 1st defendant on 19.04.2004 by which the 1st defendant agreed to sell the suit property to the plaintiff for a total sale consideration of Rs.1,75,000/-. A sum of Rs.1,00,000/- was paid by the plaintiff to the 1st defendant at the time of sale agreement itself towards advance. The balance of sale consideration, thus, was only Rs.75,000/-. Incorporating the terms and conditions of the sale agreement, a deed of sale agreement was executed by the 1st defendant on 19.04.2004 itself. The 2nd defendant is the employee of the 1st defendant. Subsequently, on 20.03.2005, a sum of Rs.50,000/- was paid by the plaintiff to the 1st defendant. Thus, the balance of sale consideration was only Rs.25,000/- as on 20.03.2005. According to the plaintiff, she was all along ready and willing to pay the balance of sale consideration. Though she made several attempts to complete the sale in her favour, the 1st defendant did not ready and come forward to perform his part of contract, after receiving the balance of sale consideration. Therefore, the plaintiff filed the present suit for specific performance. She also deposited the balance of sale consideration of Rs.25,000/- to the credit of the trial court.

4. In the written statement, the 1st defendant contended that the suit is liable to be dismissed for non-joinder of necessary party, namely, one K.G.R.Housing Private Limited who is the vendor to the sale agreement in question. He also took the plea that the payment made on 20.03.2005 cannot give rise to a cause of action for the plaintiff to file the present suit. He also took the plea that the plaintiff had not come forward with clean hands. He also contended that the time stated in the sale agreement is an essence of contract.

5. The 2nd defendant has filed a separate written statement stating that he was not aware of the negotiations that took between the plaintiff and the 1st defendant. He also denied the payment of Rs.50,000/- on 20.03.2005 by the plaintiff to the 1st defendant.

6. Based on the above pleadings, the trial court framed appropriate issues. On the side of the plaintiff, she was examined as P.W.1 and as many as 6 documents have been exhibited. Ex.A.1 is the sale agreement. Ex.A.2 is the receipt issued by the 1st defendant for Rs.1,00,000/- evidencing the payment made on 19.04.2004. Ex.A.3 is the receipt for Rs.500/- which was paid by the plaintiff to the defendant for preparing the documents. Ex.A.4 is the receipt issued by the 1st defendant for Rs.50,000/- which was paid on 20.03.2005. Since the 1st defendant did not come forward to

perform his part of contract which would amount to cheating, the plaintiff made a complaint before the Korattur Police Station on 29.05.2007. A copy of the complaint has been marked as Ex.A.6 and the receipt issued by the police for the said complaint is marked as Ex.A.5. On the side of the defendant, the 1st defendant was examined as D.W.1 and no document was exhibited on his side. Having considered all the above, the trial court decreed the suit as prayed for and the same was confirmed by the lower appellate court. Challenging the same, the appellants are before this Court with this Second Appeal.

7. The learned Counsel for the appellants would submit that the courts below have failed to consider that whether the 1st appellant has capacity or title to execute the agreement in question and in turn to execute the sale deed in favour of the plaintiff. The learned Counsel for the appellants would further submit that the courts below have failed to appreciate as to whether the plaintiff is entitled for a decree for specific performance or she is entitled for a decree for refund of the money paid under the sale agreement. It is also contended that the plaintiff was not ready and willing to perform her part of contract all through. The learned Counsel for the appellants would further submit that the document under Ex.A.1 dated 19.04.2004 cannot be considered as an agreement at all.

8. The learned Counsel appearing for the respondent would stoutly oppose this Second Appeal. He would submit that there is no question of law much less a substantial question of law at all involved in this Second Appeal warranting admission. The learned Counsel would further submit that in the written statement, the 1st defendant/1st appellant had not disputed the execution of the sale agreement at all. He would also submit that the act of the 1st appellant in denying to execute the sale deed in favour of the plaintiff would amount to clear cheating. The learned Counsel for the respondent would further submit that the 2nd appellant herein, who was the 2nd respondent in the First Appeal, has now joined with the 1st appellant to file the present Second Appeal together which itself would go to show that they are colluding with each other and the present Second Appeal as framed is not maintainable.

9. I have considered the above submissions.

10. As rightly submitted by the learned Counsel for the respondent/plaintiff, absolutely, there is no question of law much less a substantial question of law involved in the Second Appeal warranting admission. Nowhere in the written statement, the execution of the sale agreement is disputed. Ex.A.1 is the sale agreement executed by the 1st defendant. The receipts for payment have also been proved by the plaintiff. The courts below have appreciated the oral and documentary evidence to come to the conclusion that the sale agreement is true and the payment of money as claimed by the plaintiff is also true. Though it is contended by

the learned Counsel for the appellants that the time is the essence of contract, the courts below have held that the time is not the essence of contract. The courts below have given cogent reasons for coming to the said conclusion on appreciating the oral and documentary evidence that the plaintiff is entitled for decree for specific performance. In the said conclusion arrived at by the courts below, I do not find any infirmity or any perversity. There is also no substantial question of law involved in the Second Appeal.

11. In the instant case, the learned Counsel for the appellants would submit that the payment of Rs.50,000/- under Ex.A.4 receipt which was signed by the 2nd defendant cannot be taken as payment made to the 1st defendant. But, there is no quarrel over the fact that the 2nd defendant is the employee of the 1st defendant. The very fact that the defendants 1 and 2 joined together now to file the present Second Appeal would go to establish their relationship. The courts below have held that having received Rs.50,000/- on 20.03.2005, these appellants have taken an untenable stand that the said payment would not amount to proper payment.

12. In my considered view, the appellants/defendants in the suit, having entered into the sale agreement and having received the money, after having represented to the plaintiff that they would execute the sale deed without any lawful excuse, have unnecessarily dragged the poor woman to approach the court and these appellants have vexatiously litigated the matter for about 8 years. This Second Appeal was filed before this Court on 27.02.2015 and the same came up for admission before this Court on 05.06.2015. But the learned Counsel for the appellants did not come forward to argue the matter, instead, he took adjournment. The matter was repeatedly adjourned at the instance of the learned counsel for the appellants. The records would go to show that 11 adjournments were taken repeatedly by the learned Counsel for the appellants.

13. When the matter came up for hearing before this Court on 16.12.2015, this Court ordered the matter to be listed under the caption ''for dismissal'' on 17.12.2015. On 17.12.2015, the matter was fully argued by the Counsel on either side. When this Court commenced to dictate the judgment, the learned Counsel for the appellants intercepted and submitted that he would advise the 1st defendant to execute sale deed in favour of the plaintiff within a period of two weeks and on that score, he wanted again adjournment. Therefore, this Court adjourned the matter to 18.12.2015 (today).

14. Today, the learned Counsel for the appellants submitted that the 1st defendant is not prepared to execute any sale deed. This conduct of the appellants would go to show that they are unnecessarily litigating before one court or the other and unnecessarily dragging this poor woman, namely, the plaintiff to face this litigation for several years, though the plaintiff would

have intended to purchase this property for the purpose of constructing a house in the year 2007. In this case, the 1st defendant has also taken a stand that he has got no valuable title to convey. If it is so, it is not explained to this Court as to why he represented to the plaintiff that he had title and as to why he made her to believe that he had title to convey so as to enter into the sale agreement.

15. The learned counsel for the respondent would submit that the acts of the appellants would amount to an offence punishable under Section 420 of I.P.C and therefore, the respondent may be permitted to prosecute the complaint preferred by her to the police in Ex.A6 dated 29.05.2007. Prima facie, I am satisfied that there is justification in the said submission made by the learned counsel for the respondent. In this regard, I may refer to a judgment of the Hon'ble Supreme Court in M/s.Indian Oil Corporation Vs. M/s.NEPC India Ltd., and Ors reported in (2006) 6 SCC 736 wherein, the Hon'ble Supreme Court has explained as to when a breach of contractual terms would amount to cheating. In paragraph 28 of the judgment, the Hon'ble Supreme Court has held as follows:

"28. In Hridaya Ranjan Prasad Verma (supra), this Court held : "On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time to inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of

making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.”
(emphasis added)

16. Applying the above yardstick to the facts of the present case, the various considerations narrated herein above would prima facie indicate that at the time when the contract was entered into, the appellants have induced the respondent intentionally thereby committed an offence punishable under Section 420 I.P.C. I hasten to act that it is only an observation based on prima facie opinion and the same shall not be misconstrued as an adjudication or a finding. It is for the respondent to workout her remedy either through the police or by way of a private complaint if she is satisfied that the appellants have committed an offence punishable under Section 420 of I.P.C. I only state that the Station House Officer of Korattur Police Station shall look into the complaint in Ex.A6 dated 29.05.2007 and may proceed further in accordance with the law as dealt with by the Hon'ble Supreme Court in Lalita Kumari Vs. Government of U.P. reported in (2014) 2 SCC 1. The respondent is at liberty to present a copy of the complaint in Ex.A6 to the Inspector of Police, Korattur Police Station for necessary action.

17. In a nutshell, as I have already stated, there is no substantial question of law involved in this Second Appeal and for having dragged on the proceedings for 7 years and for having made the respondent to suffer, the appellants have to pay cost of this Second appeal besides the cost as per the decree of the trial court. In other words, the cost as stated by the trial court and the cost incurred by the respondent for this Second Appeal should be paid by the appellants.

18. In the result, the Second Appeal fails and the same is accordingly dismissed. The decree and judgment of the lower appellate court is hereby confirmed with a direction to the 1st defendant to execute a sale deed within a period of eight weeks from today and in the event, the 1st defendant fails to execute the sale deed, appropriate sale deed may be executed by the court concerned. It is further directed that the appellants shall pay cost of this Second Appeal along with the cost of the trial court proceedings as directed in the decree of the trial court to the respondent.

Sd/-

Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

tsi/kk

To

- 1.The Principal District Judge, Tiruvallur.
- 2.The Subordinate Judge, Tiruvallur.

- 1 cc to Mr.S. Subramanian, Advocate, Sr. 68463
2 ccs to Mr.M. Ravindhar, Advocate, Sr. 68433

S.A.No.315 OF 2015

RSI (CO)
kk 7/1



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