IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 07.11.2016
PRONOUNCED ON: 19.12.2016

CORAM :

THE HONOURABLE MR.JUSTICE T.RAVINDRAN
S.A.No.280 of 2011
&
MP.No.1 of 2011

Thirugnanasambandam ..Appellant/Defendant

Vs.

Venkatraman Pillai ..Respondent/Plaintiff

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 23.07.2010 passed in A.S.No.69 of 2009 on the file of Subordinate Judge, Mannargudi reversing the judgment and decree dated 24.07.2009 passed in O.S.No.29 of 2007 on the file of District Munsif Court, Thiruthuraipoondi.

For Appellant : Mr.A.Muthukumar
For Respondent : Mr.S.Nagaraj

J U D G M E N T

Challenge in this Second appeal is made by the defendant against the judgment and decree dated 23.07.2010 passed in A.S.No.69 of 2009 on the file of Subordinate Judge, Mannargudi reversing the judgment and decree dated 24.07.2009 passed in O.S.No.29 of 2007 on the file of District Munsif Court, Thiruthuraipoondi.

2.Suit for recovery of money.

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

The defendant had agreed to convey the suit properties to the plaintiff for a sum of Rs.1,28,250/- and the plaintiff also having giving consent to the same, the plaintiff and the defendant entered into a Sale Agreement on 10.01.2002 evidencing the above said transaction and pursuant to the same, the plaintiff advanced a sum of Rs.80,000/- to the defendant towards a part of the sale consideration and the time for completing the sale agreement is two years. The defendant entrusted the title deeds of his properties to the plaintiff. However, despite several requests by the plaintiff, the defendant had on some pretext or the other delaying the completion of the execution of the sale deed. The plaintiff was ready to entrust the title deeds to the defendant while so the defendant on the ground that the title deeds in respect of one property is required for taking survey measurement, obtained the same from the plaintiff and despite the request of the plaintiff to hand over the same, the defendant did not respond properly and therefore, raising suspicion on the conduct of the defendant, the plaintiff issued a legal notice to the defendant claiming the specific performance of the Sale Agreement on 12.06.2006 and on the receipt of the said notice, the defendant sent the reply containing false allegations. The plaintiff also learnt that the defendant has alienated the property comprised in S.No.429/16, the above conduct of the defendant amounts to breach of contract. Hence, the plaintiff is not willing to purchase the suit properties pursuant to the sale agreement and the plaintiff has therefore come forward with the present suit seeking for the refund of the advance amount paid by him to the defendant with a relief of creating charge for the same over the suit properties.

4.The case of the defendant in brief is as follows:

The suit is not maintainable either in law or on facts. It is false to state that the defendant and the plaintiff entered into a Sale Agreement on 10.01.2002, whereby the defendant agreed to convey the suit properties to the plaintiff for a sum of Rs.1,28,250/- and that the plaintiff had advanced a sum of Rs.80,000/- to the defendant. The defendant did not receive any amount from the plaintiff as part of the sale consideration and did not execute any sale agreement in favour of the plaintiff and it is also false to state that the parties have agreed to complete the sale transaction within two years from the date of the sale agreement and that the defendant entrusted his title deeds to the plaintiff. To the notice sent by the plaintiff on 12.06.2006, the defendant sent a suitable reply on 16.06.2006 and in the reply notice he has given the true facts. The defendant had sold his land to one Arumugam Chithiran and out of the sale consideration he has discharged the debt incurred by him from the plaintiff and settled the account with the plaintiff and despite the request of the defendant to the plaintiff to hand over the title deeds, the plaintiff insisted that the defendant still owed money to him in respect of the earlier transactions and directed the defendant to take back the title deeds after the discharge of the same and accordingly the defendant by selling his Power Tiller, paid a sum of Rs.28,000/- to the plaintiff on 26.06.2004 and further paid Rs.5000/- on 27.02.2006 and settled the account. Even there after, the plaintiff did not hand over the title deeds to the defendant on the pretext that they are in the custody of his wife and that she is not in station and subsequently, despite the requests of the defendant, the plaintiff did not hand over the title deeds and on the other hand sent a false notice dated 12.06.2006 to which, the defendant sent a suitable reply containing the true events. Therefore in as much as the defendant had paid the debt incurred by him from the plaintiff, the case of the plaintiff that the sale agreement has been entered into between the parties in respect of the sale of the suit properties of the defendant is unsustainable. It is the usual practice of the plaintiff to obtain the sale agreement, when ever loans are sought for from him and accordingly the defendant also used to execute the sale agreement in favour of the plaintiff and after the discharge of the debt, used to get back the sale agreements. However, on account of the enmity at present, the plaintiff has come forward with the false suit. The plaintiff is not entitled to any amount from the defendant and the suit is not maintainable and hence the suit is liable to be dismissed.

5.In support of plaintiff's case PW1 has been examined. Exs.A1 to A4 were marked. On the side of the defendant, DW1 & 2 were examined. Exs.B1 to B6 were marked. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to dismiss the suit. The plaintiff challenged the same. The first Appeal preferred by the plaintiff was allowed and consequently, the suit has been decreed by the first Appellate Court. Challenging the same, the present Second Appeal has been instituted.

6.The Second Appeal has been admitted and the following substantial questions of law are formulated for consideration in this Second Appeal:

(a)When time for performance of the contract was fixed in the Sale Agreement, Ex.A1= Ex.B4, whether the lower Appellate Court erred in law in holding that the time starts for filing suit only from the date of refusal, viz., from the date of reply notice Ex.A4, contrary to Article 54 of the Limitation Act, 1963?

(b)Whether Ex.A4 is bad in law in view of the material alteration with regard to limitation?

The short point that arises for consideration in this Second Appeal is whether the suit laid by the plaintiff for the refund of the advance amount is barred by limitation or not?

7.The suit has been laid by the plaintiff for refund of the advance amount tendered by him to the defendant, pursuant to the Sale Agreement dated 10.01.2002, which has been marked as Ex.A1. The case of the plaintiff is that the defendant agreed to sell the suit properties to him for a sum of Rs.1,28,250/-, accordingly, the parties entered into the sale agreement and the plaintiff advanced a sum of Rs.80,000/- to the defendant as part of the sale consideration on the date of agreement and the time fixed for the execution of the sale deed is two years and even though, the plaintiff was ready and willing to perform his part of the contract, in as much as the defendant has alienated a portion of the property comprised under the sale agreement, which act of the defendant amounts to breach of contract and as the plaintiff is not willing to further go ahead with the sale agreement and complete the sale transaction, according to the plaintiff, he has come forward with the present suit seeking for the refund of the advance amount coupled with the prayer of the charge over the suit properties till the amount is paid by the defendant.

8.Per contra, it is denied by the defendant that the plaintiff and the defendant entered into the sale agreement in respect of the suit properties on 10.01.2002 for a sum of Rs.1,28,250/- and based upon the same, the plaintiff paid a sum of Rs.80,000/- to the defendant as advance and the time fixed for completing the same is two years. According to the defendant, he used to borrow the loans often from the plaintiff and as per the practice of the plaintiff when ever loan is tendered, the plaintiff used to get the sale agreement from the borrowers and accordingly the defendant himself had executed various sale agreements in favour of the plaintiff on earlier occasions for the amounts borrowed from the plaintiff and later on discharging the loan he used to get back the sale agreement and thus according to the defendant in respect of the earlier loan transaction that he had with the plaintiff for the amount due, the plaintiff forced the defendant to execute the sale agreement now in question marked as Ex.A1 and left with no other alternative, the defendant had executed the sale agreement and also entrusted the title deeds of his property to the plaintiff and subsequently, by sale of one of his properties to one Arumuga Chithiran, the defendant had paid a sum of Rs.20,000/- to the plaintiff and settled the account. However, in as much as the plaintiff insisted that further sum is still due in respect of the loan transaction, the defendant after selling the Power Tiller, paid a sum of Rs.28,000/- to the plaintiff on 26.06.2004 and again a sum of Rs.5000/- on 27.02.2006 and even there after, i.e., after the settlement of the account, the plaintiff did not hand over the title deeds to him on the pretext they are in the custody of his wife and that she was not in station and even subsequently, the plaintiff did not come forward to hand over the title deeds and on the other hand has sent a legal notice claiming the specific performance, to which the defendant has sent a suitable reply containing the true facts and therefore, according to the defendant the sale agreement projected by the plaintiff marked as Ex.A1, has been forcibly obtained by the plaintiff from the defendant alongwith the title deeds and thus being the position, according to the defendant, the plaintiff is not entitled to get the relief sought for.

9.To establish his case that the plaintiff was in the habit of obtaining the sale agreements from the defendant towards the loan transactions, no doubt the defendant, during the course of cross examination of the plaintiff has marked Exs.B1 to B3, Sale Agreements and the same had also been admitted by the plaintiff in his evidence.

10.On the basis of Exs.B1 to 3, it is contended by the learned counsel for the defendant that similarly, Ex.A1, Sale Agreement has also been obtained by the plaintiff from the defendant forcibly alongwith his title deeds in respect of the earlier loan transaction and therefore, the question of refund of the alleged advance amount mentioned under Ex.A1, does not arise.

11.The plaintiff in his evidence has categorically denied that Ex.A1 has been obtained by him from the defendant in respect of the earlier loan transaction. Even though, he has admitted Ex.B1 to 3 transactions, firmly he has denied the case of the defendant in respect of Ex.A1, Sale Agreement. In such circumstances, the defendant without adducing any further material to sustain his case, cannot, on an analogy equate the case of the Sale Agreement, Ex.A1, to the other sale agreements marked as Ex.B1 to B3.

12.Now according to the defendant, in respect of the earlier transaction amounting to Rs.20,000/- alleged to have been borrowed by him from the plaintiff, the plaintiff had forcibly obtained the sale agreement in question alongwith the title deeds and since he was depending upon the plaintiff for the loan amounts left with no other alternative, he had executed the Sale Agreement dated 10.01.2002 marked as Ex.A1. Therefore, according to the case of the defendant Ex.A1 was not executed by the defendant out of his free will and consent and on the other hand, it has been forcibly obtained from him by the plaintiff in respect of the earlier loan transaction. If that be the usual practice of the plaintiff, he would have also secured the title deeds of the defendant in respect of the transactions covered under Ex.B1 to B3. But it is not the specific case of the defendant that even in respect of Ex.B1 to B3 transactions, the defendant had part with his title deeds to the plaintiff and that after the discharge of the loan amount pertaining to the same, he had received back the title deeds from the plaintiff. Therefore, the theory now projected by the plaintiff that out of force exerted by the plaintiff, he had executed the Sale Agreement, Ex.A1 and also parted with the title deeds in respect of his properties cannot be accepted straightaway. If that be the case, if according to the defendant, the plaintiff out of force and compulsion and unlawfully had obtained the Sale Agreement, Ex.A1 from the defendant and not stopping there also obtained the title deeds of the properties of the defendant, as rightly argued by the learned counsel for the plaintiff, as a prudent person, the defendant would have taken legal redressel available to him, as per law. He would have preferred necessary complaint against the plaintiff for his unlawful acts or would have instituted necessary suits against the plaintiff for necessary reliefs particularly for getting back the title deeds of his properties as early as possible. However, the defendant for reasons best known to him had not moved his little finger in any manner either to rescind the Sale Agreement, Ex.A1 on the footing, it has been illegally obtained from him by the plaintiff or get back the sale deeds of his properties from the plaintiff. That apart, it has not been stated by the defendant clearly in his written statement or in the reply notice marked as Ex.B5, that in respect of which loan transaction he was found to be due for a sum of Rs.20000/- to the plaintiff in respect of which the sale agreement in question is said to have been forcibly obtained by the plaintiff from the defendant.

13.Therefore, as per the case of the defendant, it appears that even prior to Ex.A1 or the execution of Ex.A1, the defendant has borrowed loans from the plaintiff. However, the defendant has not come out with clear averments with reference to which earlier loan transactions he had with the plaintiff, the sale agreement in question is said to have been taken from him forcibly by the plaintiff.

14.Be that as it may, now according to the defendant, by selling one of his properties to one Arumugam Chittiran, he has paid a sum of Rs.20000/- to the plaintiff and demanded the plaintiff to return the sale deeds of his properties. However, according to the defendant, in as much as the plaintiff insisted that further sum of Rs.30000/-, is still due from the defendant, according to the him, left with no other alternative, he has sold his Power Tiller and thereby paid a sum of Rs.28000/- to the plaintiff on 26.06.2004 and further paid a sum of Rs.5000/- on 27.02.2006 and thereby settled the loan transaction he had with the plaintiff.

15.The above case of the defendant is vehemently refuted by the plaintiff. Even then, the defendant has not placed any material to sustain the above factum of his defence theory. If according to the defendant he had paid a sum of Rs.20000/- to the plaintiff as alleged by him he would have obtained necessary receipt for the same from the plaintiff. The receipt has not been produced nor any independent witness examined evidencing the payment of the above sum has been examined. The evidence of DW2 examined on the side of the defendant does not improve his case. Similarly, for the subsequent payments alleged to have been made by the defendant to the plaintiff in a sum of Rs.28000/- on 26.06.2004 and a sum of Rs.5000/- on 27.02.2006 also, if really such payments have been made, the defendant would have insisted the plaintiff to give due receipts acknowledging the payment or established the above payments through acceptable and reliable evidence.

16.However, baring the ipse dixit testimony of the defendant, no other material is forthcoming to buttress the above case of the defendant. If really the defendant had paid the entire loan amount that he had borrowed from the plaintiff and settled the account and if even there after the plaintiff had not returned or cancelled the sale agreement in question or returned back the title deeds of his properties, as a prudent person in the normal course of events, the defendant would have taken necessary legal action against the plaintiff. However, according to the defendant in as much as the plaintiff has informed that the title deeds of his properties were in the custody of his wife, as his wife was not in station, the defendant was unable to get back the title deeds. Even assuming the above reason to be true, nothing prevented the defendant to get back the title deeds of his properties, subsequently from the plaintiff on the return of the plaintiff's wife or at least get back the sale agreement duly discharged from the plaintiff, if it had been obtained in respect of the loan transaction as now alleged by the defendant.

17.However, according to the defendant, despite several requests, the plaintiff has on some pretext or the other, refused to return the title deeds and subsequently it is stated that the plaintiff had sent a legal notice on 12.06.2006. The above theory projected by the defendant, cannot be accepted. In the normal course of events, if really he had discharged the loan amount and settled the account of the plaintiff, as done earlier in the case of Ex.B1 to B3, he would have received back Ex.A1, Sale Agreement also from the plaintiff. However, giving a new theory for the failure of the defendant to get back the sale agreement in question, according to the defendant on account of the difference of opinion between him and the plaintiff, the plaintiff had not returned back either the sale agreement in question duly discharged or the title deeds of his properties. If that be the case, what prevented the defendant from taking suitable legal action against the plaintiff has not been explained in any manner by the defendant. Therefore, it could be seen that the defendant has raised the defence in the present case without any foundation and therefore, unable to sustain the same by adducing acceptable and reliable proof.

18.In the light of the above discussions, the theory projected by the defendant that Ex.A1, Sale Agreement has been taken forcibly from him by the plaintiff in respect of the earlier transaction alongwith his title deeds cannot be believed in any manner and as rightly argued, the above defence has been taken for the purpose of this case to deceive the lawful rights of the plaintiff. The plaintiff's case is that the parties had agreed to complete the sale transaction within two years as stipulated in the Sale Agreement, Ex.A1 and accordingly on seeing the attitude of the defendant amounting to breach of contract, left with no other way, it is stated that the plaintiff issued a legal notice and there after instituted the present suit.

19.The above case of the plaintiff that time limit stipulated in the agreement for completing the transaction is fixed as two years is challenged and on the other hand, as per the defendant's case, the time limit is fixed only as one year and hence according to the defendant, the plaintiff has caused a material alteration in the agreement with reference to the time from 1 to 2 years and therefore, if the time limit is fixed for the completion of the contract is one year, the limitation for instituting the suit for the refund of advance amount, according to the defendant, commences from 10.01.2003 and in as much as the plaintiff has not laid the suit within three years thereafter, instead filed the suit on 15.12.2006, it is argued that the suit is barred by limitation. It is further argued that even assuming for the sake of arguments that Ex.A1 has been taken only as sale agreement in respect of the purchase of the properties, even then according to the defendant, in as much as one year period is fixed in the sale agreement, as per Article 54 of the Limitation Act, the plaintiff should have file the suit within three years from the date fixed for the performance.

20.In this case, in as much as the plaintiff has failed to file the suit on or before 10.01.2006 and on the other hand instituted the suit only on 15.12.2006, according to the learned counsel for the defendant, the suit is clearly hit by limitation.

21.The first Appellate Court invoking the second part of Article 54 of the Limitation Act computed the period of limitation from the refusal of the performance of the contract and accordingly, held that the suit is not barred by limitation. On the same line, the learned counsel for the plaintiff also placed his submissions in the Second Appeal. Further according to the learned counsel for the plaintiff, time is not the essence of the contract in respect of the immovable properties and for explaining that proposition of law, he relied on the authority reported in 2010 (3) CLT 560 (S.Sambandam Vs. C.Pushparani).

22.To establish that the plaintiff had altered the period in Ex.A1, Sale Agreement, the defendant has produced the copy of the sale agreement given to him at the time of execution of Ex.A1, which has been marked as Ex.B4 and according to the defendant, the time limit in Ex.B4 is stated to be only one year and therefore, based upon Ex.B4, the Court should held that invoking the first part of Article 54 of the Limitation Act, the suit is time barred. However, the plaintiff has denied the truth and validity of Ex.B4, it is stated that the same had been created by the defendant for the purpose of this case. If according to the defendant, Ex.A1 itself has been forcibly obtained from him by the plaintiff alongwith the title deeds in respect of the earlier loan transactions, it is farfetched to contend that even at that point of time, the parties had taken a copy of the sale agreement in the nature of Ex.B4 and the same had been handed over to the defendant by the plaintiff. Therefore, the production of Ex.B4 also would belie the theory projected by the defendant that Ex.A1, Sale Agreement has been forcibly secured from him by the plaintiff in respect of the earlier loan transaction.

23.It is argued by the learned counsel for the defendant that the plaintiff has failed to examine the attestor of the sale agreement to establish that the time limit fixed in the sale agreement is only two years and not one year as mentioned in Ex.B4. According to the plaintiff, in as much as the attestor is related to the defendant, he was unable to examine the attestor. To the same, it is contended by the defendant that in such circumstances also the duty is cast upon the plaintiff to examine the attestor and in the event of the attestor not supporting the plaintiff's case, the plaintiff would be entitled to treat him as an hostile witness and cross examine him with reference to his case.

24.Be that as it may, it is found that the theory projected by the defendant that Ex.A1, Sale Agreement was taken forcibly by the plaintiff in respect of the loan transaction has not been established by the defendant. No doubt, on the face of it, the period is found to be altered in Ex.A1. However, to establish his case, nothing prevented the defendant from examining the attestor. It is not the case of the defendant that the attestor is not his relative or known to him. Therefore, if really the period fixed and agreed to be fixed is only one year, nothing prevented the defendant from examining the attestor to elicit the truth. No doubt it is the duty of the plaintiff to establish the Sale Agreement Ex.A1, in complete particularly, even with reference to the period mentioned in the agreement when the same has been disputed.

25.Be that as it may, since the Second Appeal is confined mainly on the question of limitation, in my considered opinion, its immaterial whether the period mentioned in the sale agreement in question is one year or two years as it is found that as regards the refund of advance amount by the agreement holder, the relevant article for the same would not be Article 54 of the Limitation Act and on the other hand the relevant Article would be only Arcicle 62 of the Limitation Act.

26.Insofar as this case is concerned, it is found that the defendant has failed to establish that Ex.A1, Sale Agreement is forcibly obtained by the plaintiff in respect of the earlier loan transaction. It is therefore clear that the sale agreement in question was only pursuant to the agreement entered into between the parties towards the sale of the suit properties. However, instead of seeking the main relief of specific performance, the plaintiff has chosen to lay the suit only for the refund of advance amount based upon the sale agreement. In such circumstances, whether the period mentioned in the sale agreement is one year or two years, when it is found that only Article 62 of the Limitation Act would apply in such case, it could be seen that the suit instituted by the plaintiff on 15.12.2006 is not hit by the law of Limitation.

27.In this connection, it is found that the Hon'ble Apex Court in the decision reported in 2004 (2) L.W 871(Videocon Properties Ltd., Vs. Dr. Bhalchandra Laboratories & Others) has held that the buyer under an agreement for sale of an immovable property was entitled to a charge on the property as against the seller to the extent of the seller's interest in the property for the amount of any purchase money paid and for the interest on such amount and that as per section 55(6)(b) of the Transfer of Property Act, 1882, the buyer under the agreement for sale was entitled to a charge even against the third party purchaser.

Further, in the decision reported in 2000(1) CTC 507 (Delhi Development Authority Vs. Skipper Construction Co.(P) Ltd., and Others), the Hon'ble Apex Court has held that the charge of the purchaser under Section 55(6)(b) of the Transfer of Property Act, 1882, would continue to run even after the conversion of the property into some other property. In addition, in the said case, the Hon'ble Supreme Court held that the period of limitation for enforcement of refund of purchase money paid on the sale agreement with regard to the immovable property plus interest thereon shall be 12 years from the date when the money becomes due.

Article 62 of the Limitation Act, 1963(which corresponds to Article 132 of the Limitation Act, 1908) provides a period of 12 years ''to enforce payment of money secured by a mortgage or otherwise charged upon immovable property''. Time runs from the date ''when money became due''.

28.Following the above decisions of the Hon'ble Supreme Court of India, our High Court in the decision reported in 2013 (5) LW 253(K.Shanmugam & Another Vs. C.Samiappan & Others) has held that the limitation for refund of advance money with interest under an agreement for sale of immovable property is governed by Article 62 of the Limitation Act as the buyer has got a statutory charge over the property to the extent of interest of the seller and that hence the period of limitation shall be 12 years from the date on which the right to sue for the refund of advance amount accrues. In the above decision also our High Court has found that the lower Court has committed an error in invoking Article 54 of the Limitation Act, while deciding the question of limitation for such type of suit by holding the same as three years from the date of accrual of right to sue.

29.Following the above said decisions, it could be seen that the argument of the learned counsel for the defendant that the suit is barred by limitation on the footing that the time limit fixed in the sale agreement is only one year cannot be accepted in any manner. As adverted to earlier, whether the time limit fixed in the Sale Agreement, Ex.A1, is either one year or two years as the case may be, it could be seen that when the relevant article that would govern the issue is Article 62 of the Limitation Act, the plaintiff will be having 12 years period to institute the suit and accordingly, it is seen that the suit filed by the plaintiff on 15.12.2006 is well within the time and not hit by the law of limitation.

30.In the light of the above discussions, the substantial questions of law formulated in this second appeal are answered in favour of the plaintiff and against the defendant. Consequently, the second appeal fails and is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

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To

1.The Subordinate Judge,
Mannargudi.

2.The District Munsif Court,
Thiruthuraipoondi.

Copy to : The Section, High Court,
Vr Section, High Court, Madras.

+1cc to M/s. A. Muthukumar, Advocate, S.R.No.73952
+1cc to Mr.S. Nagarajan, Advocate, S.R.No.73854

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