

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 23.11.2016

PRONOUNCED ON:15.12.2016

CORAM :

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.362 of 2011

&

MP.No.1 of 2011

D.Aruljothi ... Appellant/Respondent/Defendant

Vs.

1.M.Devaprakash

2.M.Karthikeya Senthil ... Respondents/Appellants 2&3

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 25.11.2010 passed in A.S.No.51 of 2010 on the file of the Principal District Judge, Erode reversing the judgment and decree dated 08.08.2009 passed in O.S.No.45 of 2007 on the file of the Principal Subordinate Judge, Gobichettipalayam.

For Appellant : Mr.R.T.Doraisamy
For Respondents : Mr.M.Narayanasamy

J U D G M E N T

The defendant in this Second Appeal has impugned the judgment and decree dated 25.11.2010 made in A.S.No.51 of 2010 on the file of the Principal District Judge, Erode reversing the judgment and decree dated 08.08.2009 made in O.S.No.45 of 2007 on the file of the Subordinate Judge, Gobichettipalayam.

2.The suit has been laid by the plaintiff for the recovery of the advance amount with subsequent interest.

3.The plaintiff and the defendant entered into a Sale Agreement on 17.03.2004 in respect of the sale of the suit property and the sale price was fixed @ Rs.12,60,000/- and pursuant to the sale agreement above mentioned, the defendant received a sum of Rs.3,00,000/- as advance from the plaintiff on the date of the sale agreement itself and the period for completing the sale transaction is fixed at 6 months. The defendant has agreed to sell the suit property free of encumbrance. As regards the above facts, the parties are not at issue.

4. Now, according to the plaintiff, he has been always ready and willing to perform his part of the contract in making the payment of the balance sale consideration and in as much as it has been found that there is encumbrance over the suit property agreed to be conveyed under the sale agreement and in as much as the defendant has not cleared the cloud of title in respect of the suit property and been ready to convey the suit property free of encumbrance, according to the plaintiff, he has been necessitated to lay the suit for recovery of the advance amount paid by him to the defendant with interest.

5. Per contra, according to the defendant, the plaintiff has never been ready and willing to perform his part of the contract as per the recitals found in the sale agreement and there is no encumbrance in respect of the suit property as pleaded by the plaintiff and in as much as the plaintiff has not come forward to complete the sale transaction by tendering the balance sale consideration as stipulated in the sale agreement, as per the terms and conditions of the sale agreement, the advance amount paid would be forfeited and hence the plaintiff is not entitled to claim the refund of the advance amount paid under the sale agreement.

6. Therefore, the main issue that is involved in this case is whether or not there is cloud over the title of the suit property agreed to be conveyed under the sale agreement as pleaded by the plaintiff. The evidence adduced in this case would go to show that the parties have entered into a sale agreement and the said Sale Agreement has been marked as Ex.A1. As found earlier, time for completing the sale transaction is 6 months. Now according to the plaintiff, he had come across the paper publication issued by M/s.L.G. Balakrishnan and Brothers Ltd, informing that the suit property agreed to be conveyed to one Manivannan, the vendor of the defendant and the said Manivannan had misappropriated a sum of Rs.6,20,659/- from the above said Company and handed over the original Sale Deed dated 10.06.1964 with an intention to create an equitable mortgage in favour of the said Company for the due repayment of the above amount and the notification stated that no one should have any transaction with regard to the suit property and therefore it is argued that in as much as the defendant did not readily respond and come forward to clear the above cloud of title over the suit property, he has chosen not to proceed further under the sale agreement and instead laid the suit for the recovery of the advance amount after the issuance of the pre-suit notice. The pre-suit notice dated 16.09.2004 has been marked as Ex.A3. The receipt of Ex.A3 has not been disputed.

7. From the evidence adduced, it could be seen that the Company M/s.L.G. Balakrishnan and Brothers Ltd has laid the suit in O.S.No.78 of 2004 against Manivannan, the vendor of the defendant, claiming a sum of Rs.4,77,174.40 and also took

out an application praying that Manivannan should not encumber the property. It is found that the petition with reference to the same has been filed on 16.04.2004. Therefore, the lower Appellate Court has found that even before expiry of the time stipulated in the Sale Agreement Ex.A1, the above referred suit has been laid and it could also be seen that subsequently, a decree has also been passed in the said suit on 14.11.2006. A copy of the decree has been marked as Ex.A7, and the Company had also obtained a charge over the suit property for the decree amount passed in the suit.

8. Therefore, it is found that for the amount due to the Company by the vendor of the defendant, namely Manivannan, the Company had obtained charge in respect of the suit property and it could therefore be seen that there is encumbrance over the suit property and without clearance of the same, the plaintiff would not have been in a position to perform his part of the contract and complete the sale transaction.

9. The plaintiff has issued a legal notice as already referred to marked as Ex.A3, where under he had requested the defendant to clear the cloud over the title. Though the defendant has acknowledged the receipt of the notice, he has not responded to the same i.e., no reply has been sent. On the other hand, the defendant, seems to have sent a notice dated 23.04.2004, the copy of which has been marked as Ex.A13, to the above mentioned Company and Manivannan, the vendor of the defendant and others. There under, it has been admitted by the defendant that his vendor Manivannan had not handed over the original title deeds of the suit property at the time of selling the suit property to the defendant and according to the defendant as he had verified the encumbrance in respect of the suit property from the Office of the Registrar, he had not chosen to obtain the original Sale Deed from the vendor.

10. That apart under Ex.A13, the defendant had also requested the above said Company not to proceed with the suit property for the amount due to them from Manivannan. It is therefore evident that even on the date of the Sale Agreement, Ex.A1, the property comprised therein is subjected to encumbrance as above mentioned.

11. As adverted to earlier, according to the specific case of the plaintiff though he was ready and willing to perform his part of the contract, in as much as the defendant has not come forward to convey the suit property free of encumbrance, he was unable to complete the sale transaction and hence constrained to lay the suit for the refund of the advance amount.

12. However, countering the above case of the plaintiff, it is argued by the defendant that in as much as the plaintiff was not possessed of sufficient means to pay the balance sale

consideration, he had raised a false plea as if there is encumbrance over the suit property and therefore according to the defendant in as much as it is only the plaintiff who is at fault, therefore, the plaintiff is not entitled to get back the advance amount and the advance amount stands forfeited as per the recitals and conditions stipulated in the Sale Agreement, Ex.A1.

13.However, as found by the lower Appellate Court, the plaintiff was having adequate capacity to pay the balance sale consideration and the defendant has not placed any material to take a contra view.

14.It is also found from Ex.A14, that the defendant has laid a suit in O.S.No.342 of 2005 against his vendor and the above said Company seeking for a prayer to prevent them from interfering with the possession and enjoyment of the suit property. This would only go to exposes that on coming to know the proceedings initiated by the above said Company against Manivannan and also the obtainment of the decree by the above said Company in O.S.No.78 of 2004 including a charge decree, it could be seen that the defendant had laid the suit in O.S.No.342 of 2005. As rightly found by the lower Appellate Court, despite the orders passed in favour of the defendant in O.S.No.342 of 2005 as seen from Ex.B4, the Register Extract, still the charge created over the suit property as per the decree passed in O.S.N0.78 of 2004 remains intact.

15.Therefore, the lower Appellate Court has held that without the clearance of the above said encumbrance, the plaintiff has become handicapped to complete the sale transaction and therefore, the plaintiff has come forward with the suit for the recovery of the advance amount. According to the defendant, expecting the completion of the Sale Agreement, pursuant to Ex.A1, he had entered into a sale agreement with one Selvaraj under Ex.B3 dated 30.06.2004 and therefore, if the plaintiff is given the order of refund of the advance amount, he would be put to great loss and hardship and therefore, it is contended that the plaintiff's request for the refund of the advance amount should not be acceded to.

16.However, it could be seen as found by the lower Appellate Court, that even before the Sale Agreement dated 30.06.2004, the suit in O.S.No.78 of 2004 has been filed. The plaintiff has disputed the genuineness of the Sale Agreement, Ex.B3. The attesor Srinivasan, who has been examined on the part of the defendant, as DW2 has not been able to substantiate the genuineness of Ex.B3. During the cross examination, as found by the lower Appellate Court he has admitted that he does not know who are the attestors in the Sale Agreement and he knew the defendant for about 30 years and does not know through which document the description of the property given under Ex.B3 was written and that he does

not know the contents of Ex.B3, the denomination of the stamp paper on which Ex.B3 was incorporated. Therefore, the lower Appellate Court on finding that DW2's evidence is not worthy of acceptance and reliance had held that the defendant's case cannot be countenanced based upon Ex.B3 and the evidence of DW2. To establish the authenticity of Ex.B3, Sale Agreement, as rightly found by the lower Appellate Court, the defendant has not chosen to examine the Agreement holder Selvaraj in support of his case. Further, if the defendant is unable to complete the sale transaction, pursuant to Ex.B3, the agreement holder Selvaraj, would have taken steps to rescind the contract and proceeded further. However, no notice has been claimed to have been issued from him with reference to the same. Therefore the contention that the defendant incurred huge loss on account of the failure of the plaintiff to complete the sale transaction and therefore the plaintiff is not entitled to the refund of the advance amount, as such cannot be accepted in any manner.

17.The trial Court seems to have mainly placed reliance upon the telegram issued by the defendant to the plaintiff dated 16.09.2004, which has been marked as Ex.A2. However, as rightly argued by the learned counsel for the respondents, on a reading of Ex.A2, it would go to show as if the plaintiff has to receive the balance sale consideration and execute the sale deed in favour of the defendant as per the terms and conditions of the sale agreement. It is therefore found that the contents of the telegram, Ex.A2 are found to be diametrically opposite to the recitals found in the sale agreement and therefore no safe reliance could be attached to Ex.A2, telegram to hold that the defendant is always ready and willing to perform his part of the contract and also to hold that the suit property is free of encumbrance and only on account of the failure of the plaintiff the sale could not be completed.

18.Therefore, as rightly argued by the learned counsel for the respondents, Ex.A2, telegram does not in any manner advance the case of the defendant. The very fact that the defendant has not chosen to receive the original sale deed from his vendor would only go to show that on account of some encumbrance over the suit property, his vendor did not choose to hand over the original title deed to the defendant. Despite the same, the defendant proceeded to purchase the property from his vendor Manivannan and thereafter, endeavored to enter into the sale agreement under Ex.A1 with the plaintiff promising to convey the suit property free of encumbrance and despite the promise given, the defendant was unable to clear the encumbrance and on the other hand a charge decree had been obtained against the defendant's vendor by the above said Company for the amount due to them from the vendor.

19.It could therefore be seen even at the time of the purchase of the suit property by the defendant from his vendor

Manivannan on 28.03.2003 under Ex.B1, the property is not free from encumbrance. Suppressing the same, it could be seen that the defendant agreed to convey the suit property to the plaintiff under Ex.A1, however, with a promise to clear the encumbrance. However, when it is clearly made out by the plaintiff that on account of the failure of the defendant to convey the property free of encumbrance, it is found by the lower Appellate Court, that the plaintiff has been necessitated to lay the suit for recovery of the advance amount. The lower Appellate Court has also found that the advance amount of Rs.3,00,000/- could not be construed as the earnest money for the intended sale under Ex.A1.

20.In the light of the above discussions, it could be seen that the lower Appellate Court has on the proper appreciation of the evidence adduced in the matter and also the correct application of law proceeded to hold that the plaintiff is entitled to claim the refund of the advance amount paid under the Sale Agreement, Ex.A1. No material is projected by the defendant/appellant to interfere with the findings of the lower Appellate Court for upholding the case of the plaintiff.

In conclusion, it is found that the Second Appeal has no involvement of any substantial question of law. Resultantly, the Second Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is also closed.

Sd/-
Asst.Registrar (CS VII)

/true copy/

Sub Asst. Registrar

To

1.The Principal District Judge,
Erode.

2.The Principal Subordinate Judge,
Gobichettipalayam.

Copy to:
The Section Officer,
V.R.Section,
High Court,Chennai.

+1 cc to Mr.M.Narayanaswamy,advocate,sr.73495

+1 cc to Mr.R.T.Doraisamy, advocate,sr.73175

pvs (co)
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