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IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

A.S.No.398 of 2011

M.Vijayakumari ... Appellant/ defendant

Vs.

E.Rajan ... Respondent/plaintiff

Prayer:- This Appeal suit has been filed under Section 41 Rule 1 of C.P.C.read with Section 96 of CPC, against the judgment and decree of the Principal District Judge, Vellore dated 23.12.2009 and made in O.S.No.71 of 2005.

For Appellant : Ms. V. Nivedhitha
for S.Thiruvengadam

For Respondent : Mr. R.Gopinath
for McGan Law Firm

J U D G M E N T

Aggrieved over the judgment and decree of the Trial Court decreeing the suit for a sum of Rs.4,50,000/- along with interest at 12% p.a. from 10.7.2002 to till the date of decree and thereafter, 6% p.a till the date of realization, the present appeal came to be filed by the defendant.

2. For the sake of convenience, the parties are referred to, as per their ranking before the trial Court.

3. The brief facts of the case of the plaintiff are as follows:

The defendant executed an agreement of sale dated 07.5.2001 for sale of the suit property for total consideration of Rs. 18,90,000/- and agreed to complete the sale on or before 07.03.2002. On the date of agreement, the defendant received a

sum of Rs.2,00,000/- towards advance. Subsequently, the plaintiff paid a sum of Rs. 2,50,000/- on various dates and in total, the defendant received a sum of Rs.4,50,000/- towards sale consideration. However, the sale could not be completed within the time as agreed between the parties. On 10.7.2002, negotiation took place between the plaintiff and the defendant and as per the said negotiation, the defendants agreed to refund the total advance amount of Rs.4,50,000/- within 6 months i.e. on or before 10.1.2003. However, as agreed, the defendant has not paid the amount. Hence, the plaintiff issued a legal notice on 23.4.2004 Even thereafter the defendant has not come forward to settle the amount. Hence, the suit.

4. The brief averments made in the written statement filed by the defendant are as follows:

While admitting the agreement and receipt of advance of amount of Rs.4,50,000/-, it is the only contention of the defendant that on 10.7.2002, the plaintiff came to her house along with antisocial elements and threatened her for immediate payment of the advance amount, though six (6) months time was fixed in the Panchayat convened on that date. The defendant due to threat and coercion has paid the entire amount of Rs.4,50,000/- on 11.7.2002 itself. Therefore, according to the defendant, the suit is not maintainable. Hence, the defendant prayed for dismissal of the suit.

5. Based on the above pleadings, the trial Court formulated as many as four issues for consideration. They are:

1. Whether the plaintiff has received Rs.4,50,000/- on 11.07.2002?

2. Whether the plaintiff is entitled for return of the advance amount with interest?

3. Whether the plaintiff is entitled to decree as prayed for in the plaint?

4. To what relief the plaintiff is entitled to?

6. On the side of the plaintiff, P.W.1 to P.W.3 were examined and Exs.A1 to A7 were marked. On the side of the defendant, D.W.1 to D.W.3 were examined and Exs.B1 to B4 were marked. Besides, C.W.1 and C.W.2 were examined.

7. On the basis of the evidence and materials available on record, the trial Court has decreed the suit in favour of the plaintiff. As against the same, the present appeal came to be filed.

8. The learned counsel for the appellant/ defendant would submit that the plaintiff himself in his evidence has admitted that he has signed Ex.B1 document for receipt of payment of Rs.4,50,000/-. It is the contention of the learned counsel that though the plaintiff has admitted about the receipt of payment,

the learned trial Court, without considering the same, has mechanically decreed the suit, which is not sustainable. Hence, it is submitted that the judgment of the trial Court is not based on proper appreciation of evidence. Thus, the learned counsel prayed for allowing the appeal.

9. Whereas it is the contention of the learned counsel for the respondent/plaintiff that the alleged endorsement has been fabricated and that, the same has been clearly established not only in the evidence but also in the expert opinion. The learned trial Court assessed the entire evidence and decreed the suit. Hence, it is submitted that the judgment of the trial Court does not require any interference.

10. In the light of the above submission, the points that arise for consideration in this appeal is as to (1) whether the discharge of the amount as pleaded by the defendant is true? and (2) Whether the plaintiff is not entitled to the suit amount?

Point Nos. 1 and 2:

11. It is the admitted case of the parties that on 07.5.2001, they entered into an agreement for sale wherein the plaintiff has agreed to purchase the suit property for a total sale consideration of Rs.18,90,000/- and also agreed to complete the sale transaction on or before 07.3.2002. It is also admitted by both sides that on the date of agreement, sum of Rs.2,00,000/- was paid as advance to the defendant. It is not disputed by both sides that pursuant to the agreement, Ex.A1, on subsequent dates, the defendant has received another sum of Rs.2,50,000/- towards the balance sale consideration. The endorsement made for such receipt of payment is marked as Exs. A1 to A5. The aforesaid receipt for a sum of Rs.4,50,000/- towards the sale consideration is not disputed by the defendant.

12. It is the case of the plaintiff that since the sale could not be completed, on 10.7.2002, both the plaintiff and the defendant had agreed to cancel the agreement and the defendant had also agreed to pay a sum of Rs.4,50,000/- to the plaintiff within six months i.e. on or before 10.1.2003. In this regard, an endorsement is also made in Ex.A1 agreement. Similarly, endorsement is made in Ex.B1, which is also original copy of the agreement. When Exs.A1 and B1 are carefully perused, it is seen that in fact, the parties have prepared two copies of the agreement. Ex.B1, agreement, in fact, was written in the Xerox copy of the stamp paper.

13. It is the specific case of the defendant that after the parties agreed to cancel the agreement on 10.7.2002, the very next date i.e. on 11.7.2002 itself, she repaid the entire amount

of Rs.4,50,000/- to the plaintiff and endorsement was obtained by her in the green sheet attached in Ex.B1. On a careful perusal of the endorsement made by the parties, it is very clear that both the plaintiff and the defendant had agreed to cancel the agreement and get back their advance amount. They have categorically stated that in view of the circumstances, they could not proceed the sale and hence, they decided to cancel the agreement. The defendant had also agreed to refund the sum of Rs.4,50,000/- towards the sale consideration within six months i.e. on or before 10.1.2003. This endorsement has been signed on 10.7.2002. The endorsement further shows that as if copy of Ex.A1 has been handed over to the plaintiff. Admittedly, as per the agreement, six months time was given, i.e., till 10.1.2003, to the defendant to refund the amount of Rs.4,50,000/-. If so, the contention of the defendant that very next date, i.e. on 11.7.2002, she paid the amount to the plaintiff is highly improbable.

14. It is the admission of the defendant in her evidence, that, in fact, she has drawn the aforesaid amount from the bank even 2 to 3 days prior to the settlement i.e. before 10.7.2002. If that was the case i.e. the defendant was in possession of the money at the relevant time, she could have paid the same on 10.7.2002 itself. It is not known why she waited till the next day i.e. 11.07.2002 for making such payment. This fact clearly shows that her contention is highly improbable. If really the defendant had withdrawn the amount from the Bank three days prior to 10.7.2002, she could have paid the said amount on 10.7.2002. There was no necessity arose for her to pay the said amount in the very next date. This aspect clearly creates a serious doubt about the contention of the defendant with regard to the discharge of the amount.

15. It is to be noted that the burden always lies on the person, who pleads discharge, to establish the payment of money. Though the defendant has relied upon Ex.B1, endorsement said to have been made by the plaintiff on 11.7.2002 in the presence of some witnesses, the very nature of endorsement and the manner in which it was written on the back side of green sheet would create serious doubt about the endorsement itself. The endorsement made on 10.7.2002, would clearly show that copy of the agreement was handed over to the plaintiff. That being the case, filing the same by the defendant itself creates a serious doubt. In fact, this gives an inference that the aforesaid endorsement has been subsequently created by the defendant in order to plead discharge.

16. That apart, though the defendant has stated that she had withdrawn money from the Bank prior to three days before the settlement on 10.7.2002, no document has been produced to

substantiate the same. If really the amount has been paid to the plaintiff, it is normal conduct of the human being to get back the original sale agreement. Whereas the sale agreement Ex.A1 was still with the possession of the plaintiff. In view of the above conduct of the defendant in not getting the original agreement even after the alleged payment, this Court is constrained to draw presumption under Section 114 of the Evidence Act against her.

17. Though the admission was obtained from P.W.1 by showing Ex.B1, about his signature, it is to be noted that Ex.B1 in fact, is a copy of the original agreement. When the document is shown before the party, it is quite nature for him to admit the document. That admission itself cannot be construed that he has in fact, admitted the endorsement made in the last page of Ex.B1. In this regard, P.W.1 in his evidence, both in the chief as well as in cross examination, has categorically admitted that the alleged endorsement dated 11.7.2002 is not made by him and he has not received any amount and the same has been fabricated and forgery.

18. D.W.2, one of the witnesses, was examined to prove the alleged endorsement. Though he has stated that he was present at the time of refund of amount and witnessed the same, he has admitted that he does not know who has made such endorsement at the relevant point of time. If really he was present and signed the document, he should have seen one line endorsement made in Ex.B1. D.W.2's evidence clearly falsified his own version itself. Further D.W.2's evidence clearly shows that he is the close friend of the defendant's husband. Therefore, his evidence cannot be given much importance.

19. C.W.2, Dr.P.Kirubakaran, who is the Scientific Officer working in Forensic Science Department, in his evidence has categorically stated that he compared the admitted signature of the plaintiff with the disputed signature in Ex.B1 and found that the signature found in Ex.B1 is not tallied with the admitted signature. Opinion of Expert, Ex.A7, is also filed in this regard. Expert has clearly given reason for dissimilarities found in the admitted signature and the disputed signature. The Expert was also testified before the Court and he has clearly stated that disputed signature is not that of the plaintiff.

20. Moreover, as discussed above, the conduct of the defendant in making the alleged payment in a very next day despite six months time was given itself clearly fortify the case of the plaintiff. Absolutely, there is no evidence to show that the defendant was in possession of money at the relevant point of time. Though in the cross examination, the defendant has admitted that she had withdrawn amount from the Corporation Bank

and was having money even at the time of settlement i.e. on 10.7.2002, failure to pay the amount on that date itself shows that her contention cannot be true. Further, to show that she had withdrawn money from the bank, no material is forthcoming. When all these facts have been taken into consideration cumulatively, this Court has no other option except to hold that the onus is on the part of the defendant to prove the alleged discharge. The alleged refund of advance amount has not been discharged by the defendant. The trial Court, after considering all these aspects, had rightly decreed the suit. Accordingly, these points are answered.

In the result, the appeal is dismissed. The judgment and the decree of the trial Court is confirmed. However, there shall be no order as to costs. Consequently miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To
The Principal District Judge, Vellore.

+1cc to Mr.Mc Gan Law firm, Advocate, S.R.No.23648

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