IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.09.2017

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.1 of 2009
and
C.M.P.Nos.1 of 2015 and 12985 of 2017

Raja ... Appellant/1st Defendant

Vs.

1.M.Azhakusambasivam

2.The Branch Manager,
Indian Bank,
Cuddalore. ... Respondents/Petitioners/2nd Defendant

Prayer : Appeal Suit filed under Section 96 of the Civil Procedure Code, against the Judgment and Decree of the Lower Court in O.S.No.8 of 2006 on the file of Principal District Judge, Cuddalore District dated 22.07.2008, may be set aside and the appeal may be allowed with cost through out.

For Appellant : Mr.K.Prathaban for Mr.K.Jayaraman

For Respondents : Mr.R.Moorthy (R1)
Mr.P.V.Muralidaran (R2)

J U D G M E N T

The first defendant in O.S.No.8 of 2006 is the appellant. The said suit was laid for specific performance of an agreement of sale said to have been entered into between the plaintiff and the first defendant in the said suit on 04.06.2004. According to the plaintiff, under the said agreement, the first defendant agreed to sell the house property situated at Cuddalore town, Cuddalore Taluk for a sum of Rs.10,00,000/- (Rupees ten lakh only) and received a sum of Rs.9,00,000/- (Rupees nine lakh only) as advance by cash on the date of agreement itself. A period of 20 months was fixed for the payment of balance sale consideration of Rs.1,00,000/- (Rupees one lakh only) and for execution of the sale deed. Since the first defendant did not come forward to execute the sale deed after receiving the balance sale consideration, the plaintiff has issued a legal notice to the first defendant on

17.01.2006 to which a reply notice was sent by the first defendant disputing the agreement itself on 10.02.2006. The suit came to be filed on 20.02.2006. The plaintiff would also claim that the first defendant has suppressed the mortgage which he has created with the second respondent bank and he came to know of the mortgage only on 04.02.2006 when the tender notice was issued by the authorised officer of the second respondent bank under the SARFAESI Act. The defendants resisted the suit contending that the agreement itself is not a genuine one. They further contended that the plaintiff has not paid a sum of Rs.9,00,000/- to the first defendant on 04.06.2004. The fixation of unduly long period of 20 months of the performance of the contract when the balance of the sale consideration was only 10% of the total sale consideration is also pointed out by the defendants to contend that the agreement cannot be true.

2.On the above pleadings, the learned Principal District Judge, Cuddalore framed the following issues before the trial Court:

> "1.Whether the suit agreement to sell is a forged one, if not whether the plaintiff paid to first defendant a sum of Rs.9,00,000/-?
>
> 2.Whether the sale agreement dated 04.06.2004 is a true and genuine one?
>
> 3.Whether there is any encumbrance (or) charge over the suit property prior to the alleged agreement?
>
> 4.Whether the second defendant is a necessary party to this suit?
>
> 5.Whether the plaintiff is entitled to get a decree as prayed for?
>
> 6.To what relief?"

3.On the side of the plaintiff, P.W.1 to P.W.3 were examined and Ex.A.1 to Ex.A.13 were marked. The First defendant examined himself as D.W.1 and examined his father as D.W.2. The second defendant examined one of its officials as D.W.3 and Ex.B1 to Ex.B7 were marked.

4.On consideration of both oral and documentary evidence placed before the trial Court, the learned Principal District Judge, Cuddalore concluded that the agreement is true and valid. The learned Trial Judge also found that the first defendant has suppressed the equitable mortgage created in favour of the second defendant. The learned trial Judge also found that the plaintiff was always ready and willing to perform his part of the contract. On the above findings the learned trial Judge decreed the suit for specific performance and also directed the plaintiff to pay the balance amount due under the mortgage decree obtained by the second defendant against the second respondent, bank. The decree also provided that the plaintiff would be entitled to recover any amount paid by him to the second respondent in discharge of the mortgage over and above the sale consideration of the suit property. Aggrieved against the order passed by the learned Trial Judge, the first defendant has filed the above appeal.

5.Heard Mr.K.Prathaban for Mr.K.Jayaraman, learned counsel appearing for the appellant, Mr.K.Moorthi, learned counsel appearing for the first respondent and Mr.P.V.Muralidaran, learned counsel appearing for the second respondent bank.

6.During the course of the arguments, it was submitted that the mortgage decree obtained by the second respondent had been assigned to the Asset Recovery Company viz., M/s.Reliance Asset Reconstruction Company Limited and bankers closed the account. It was also represented that the appellant had paid the balance amount due under the mortgage to M/s. Reliance Asset Reconstruction Company Limited and obtained a discharge certificate.

7.The learned counsel appearing for the first respondent would contend that the first respondent had discharged the mortgage by depositing a sum of Rs.1,00,000/- (Rupees one lakh only) with the second respondent bank, pursuant to the order of the Debts Recovery Appellate Tribunal, Chennai dated 23.10.2008. In order to ascertain the fact as to whether the mortgage debt has been discharged by the first respondent or the appellant. The Branch Manager of the second respondent bank was directed to file an affidavit. Pursuant to that the Branch Manager has filed an affidavit stating that on assignment to the Asset Recovery Company viz., M/s.Reliance Asset Reconstruction Company Limited the bank has closed the account. It is also stated that a sum of Rs.1,00,000/- was deposited by the first respondent, pursuant to the order of the Debt Recovery Appellate Tribunal dated 23.10.2008 and the same is kept in fixed deposit in the name of the first respondent itself and as and when required, the maturity value of the fixed deposit has to be paid to the first respondent. The date of maturity of fixed deposit is of 07.01.2018. It is thus clear that the mortgage was discharged at the instance of the appellant and a sum of Rs.1,00,000/- deposited by the first respondent in his own name still remains with the second respondent bank in a fixed deposit.

8.Mr.R.Prathaban, learned counsel for the appellant would stoutly contend that the agreement has not been proved to be true and valid. The learned counsel would submit that the stamp papers for the agreement have been purchased in the name of the daughter of the first respondent at Nellikuppam while the agreement has been shown to have been entered at Cuddalore.

9.P.W.Nos.2 and 3 are the attestors of Ex.A.1 agreement. Pointing out the discrepancies in the evidence of P.W.s 1 to 3 as well as the documents filed as Exs.A7 and A8, Income Tax Returns of the plaintiff. The learned counsel would contend that the plaintiff has not established that the agreement was entered into between the plaintiff and the first defendant on 04.06.2004 and the first defendant received a sum of Rs.9,00,000/- as advance in cash. The learned counsel would also contend that in the absence of the proof of payment of Rs.9,00,000/-, the plaintiff cannot claim the decree for specific performance. It is also contended that a period of 20 months was fixed for the payment of balance of sale consideration of Rs.1,00,000/- by itself creates doubts about the agreement. Per contra the learned counsel for the first respondent would contend that the agreement itself recites that a sum of Rs.9,00,000/- has been paid on the date of the agreement. The Trial Court has chosen to uphold the agreement on the evidence of PWs1 to 3. The said finding of the trial Court is based on evidence. He would also further contended that the plaintiff had filed the suit on receipt of the reply within a period of 20 months on 20.02.2006. The learned counsel would contend that the plaintiff has done what are all required in the suit for specific performance.

10.On the basis of the rival contention, the following points arise for consideration:-

1.Whether the finding of the trial Court that Ex.A1 is true and valid could be sustained and whether the plaintiff has proved that he paid the first defendant a sum of Rs.9,00,000/- on the date of the agreement?

2.Whether the plaintiff was ready and willing to perform his part of the contract, through out in terms of Section 16(c).

Point No.1:

The agreement is dated 04.06.2004. The stamp paper for the agreement was purchased in the name of one Sumathy @ Vasumathy, whom P.W.1 claims to be his daughter. The parties are admittedly residing at Cuddalore. But the stamp papers are purchased on the same date from Nellikuppam which is 13 Kilometres away from Cuddalore. PW1, in his evidence, is unable to explain the reason of purchasing the stamp papers at Nellikuppam. Further, PW1, in his evidence, would claim that a sum of Rs.9,00,000/- was paid on the date of the agreement, when the agreement was signed. PW2, who is the attestor of the document, would depose that a sum of Rs.9,00,000/- was not paid in his presence. He had also deposed that he was present when the agreement was written. Similarly, PW3, who is said to be the scribe of the document, has also stated that the advance amount was not paid in his presence. The following is the evidence relating to payment of advance:

"முன்பணமாக கொடுக்க வேண்டிய தொகை அதிகமான தொகை என்பதால் வீட்டிற்கே வந்து கையொப்பம் பெற்றுக்கொள்ளுங்கள் என்று சொன்னதால் வாதியின் வீட்டிற்கு சென்றேன். ஆனால் என் எதிரில் அந்த பணம் கொடுக்கப்படவில்லை."

11.PW2, who claims to be the attestor, has also not stated that a sum of Rs.9,00,000/- was paid in his presence. The Income Tax returns of the plaintiff have been produced as Ex.A7 and Ex.A8. Ex.A7 is the Income and Expenditure A/c for the year ending 31.03.2004. The income for the said period is shown as Rs.2,43,600/- and the cash on hand on 31.03.2004 is shown to be Rs.1,78,145/- and the cash in the bank is shown as Rs.1,83,357/-. Ex.A8 is the Income Tax returns for the year ending 31.03.2005. The gross total income from other sources is Rs.1,00,464/-, and agricultural income is shown as Rs.1,50,000/-. From the above figures, it is clear that the plaintiff could not have paid a sum of Rs.9,00,000/- on 04.06.2004 when the agreement was entered into between the parties. The oral evidence of PW1 and PW2 with reference to payment of Rs.9,00,000/- is belied by the documentary evidence produced by the plaintiff himself. PW3 has also stated in his evidence that the sum of Rs.9,00,000/- was not paid in his presence. Further, PW1, in his evidence, had stated that the plaintiff was ready to pay the entire sum of Rs.10,00,000/- to the first defendant on the date of agreement itself, but it was at the request of the first defendant, the time of execution of the sale deed was postponed. In his evidence, he would claim that the first defendant requested 10 months time for handover the vacant possession. However, there is no explanation as to why the period of 20 months was provided for paying the balance of sale consideration which was only 10% of the total sale consideration for the property. Therefore, I find that the evidence of the plaintiff regarding the payment of Rs.9,00,000/- as advance on the date of the agreement cannot be believed and the plaintiff has failed to prove the payment of Rs.9,00,000/-. Both P.W.s2 and 3 have not spoken about the payment of Rs.9,00,000/- in a convincing manner. The claim of the plaintiff that the sum of Rs.9,00,000/- was paid as advance on the date of agreement has not been established. The trial Court accepted the evidence of P.W.s 1 to 3 to conclude that the agreement is true and valid. But unfortunately, the trial Court has not taken note of the contradictions in the evidence of PW1 to PW3 and the documentary evidence in the form of Ex.A7 and Ex.A8 which go a long way to dispel the claim of payment of a sum of Rs.9,00,000/- on 04.06.2004. I am, therefore, of the considered opinion that the trial Court was not right in upholding the agreement Ex.A1.

POINT NO.2:

The agreement is dated 04.06.2004. The notice demanding performance was issued by the plaintiff on 17.01.2006 nearly about 19 months after the agreement just ahead of the expiry of the 20 months period. There is no explanation for not having demanded performance earlier. Even in his evidence as, PW1, the plaintiff has not stated that such demand was made prior to 17.01.2006. Even according to his own evidence, the first defendant only sought for 10 months time for delivering vacant possession. But, there is no explanation in his evidence as to why such unduly long period of 20 months was fixed for performance of the contract. Therefore, the plaintiff has not established his readiness and willingness to perform his part of the contract. The learned trial Judge has not framed an issue relating to the readiness and willingness, which is essential to the disposal of a suit for specific performance. No reason was given by the plaintiff for his silence between 04.06.2004 and 17.01.2006. This silence on the part of the plaintiff shows absence of readiness and willingness to perform the contract. There is a serious doubt about the very claim under the agreement and the readiness and willingness on the part of the plaintiff to perform his part of the contract.

12.In view of the above findings, the appeal is allowed. The Judgment and Decree passed by the learned Principal District Judge, Cuddalore is set aside. The suit in ***O.S.No.8 of 2006** will stand dismissed. However, there shall be no order as to costs. There shall be a direction to the second defendant to return the Fixed Deposit amount to the first respondent on its maturity or as and when it is claimed by the first respondent. Consequently, the connected Miscellaneous Petitions are closed.

13. This application has been filed under Order 47 Rule 27 of CPC seeking production of additional documents to show that the plaintiff was suffering from sufficient funds on the date of the agreements for payment and to establish the readiness and willingness of the plaintiff, he relied on the agreement itself which appears to be not a genuine document in the appeal. No purpose will be served by receiving these documents as additional documents. Hence, this petition is dismissed."

Sd/-
Assistant Registrar(CO)

***Corrected as per order**
dated 25/10/2017 made in
CMP.No.12985/17 in As.No.1/2009
-s/d-
Assistant Registrar(CO)
dt 01/11/2017

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge,
   Cuddalore District.

To be Substituted to the order already despatched on 11/10/2017

2. The Branch Manager,
   Indian Bank,
   Cuddalore.

+1cc to Mr.P.V.Muralidaran, Advocate, S.R.No.64324
+1cc to Mr.K.Jayaraman, Advocate, S.R.No.64439
+1cc to Mr.R.Moorthy, Advocate, S.R.No.64244
+3 ccs to M/s.K.Moorthy Advocate sr 76100

A.S.No.1 of 2009

RJ(CO)
CA(06/10/2017)
sj(co)
aa01/11/2017