

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.02.2017

CORAM

THE HONOURABLE MR.JUSTICE R. SUBRAMANIAN

A.S.No.11/2012 & M.P.No.1/2012

Janarthana Naidu

..Appellant

..Vs..

Hariharan

..Respondent

Prayer: Appeal filed under Section 96 of Civil Procedure Code to set aside the Preliminary Decree and Judgment dated 12.08.2011 in O.S.No.365 of 2010 passed by the learned District Judge, District Court No.II, Kancheepuram.

For Appellant	: Mr.Janarthana Naidu
For Respondent	: Mr.Adithya Varadharajan for Mr.N.Anand Venkatesh

JUDGMENT

The defendant who suffered a preliminary decree in a suit on a mortgage deed dated 23.08.2006, is the appellant. The suit in O.S.No.365/2010 was filed by the plaintiff contending that the defendant had originally entered into an agreement of sale on 01.06.2006 agreeing to convey an extent of about 1.54.5 hectares of

Punja Land, and 0.25.5 hectares of Nanja Land along with trees, borewell 3 HP Motor Pumpset and service connection for total consideration of Rs.17,25,000/- (Rupees Seventeen lakhs twenty five thousand only). The defendant had also received an advance of Rs.7,25,000/-(Rupees Seven Lakhs Twnety Five Thousand Only). The said agreement prescribed a period of three months for performance of the contract. While so, the children of the defendant namely; J.Udhayakumar along with Tmt.Chamundeeswari and Tmt.Vasantha issued a notice to the defendant and the plaintiff claiming that they are entitled to a share in the property and the defendant is not the absolute owner of the property. The said notice was issued on 22.08.2006.

2.According to the plaintiff, in view of the said notice and claim made by the children he was not willing to take the sale deed and demanded the return of the advance money. The defendant was not able to repay the advance immediately, hence he agreed to execute a mortgage deed to secure repayment. A Mortgage Deed was executed and registered for sum of Rs.7,40,000/- (Rupees Seven lakhs forty thousand only). Since the defendant did not come forward to pay the mortgage amount, the plaintiff came forward with the above suit

seeking Preliminary Decree for payment of the mortgage amount and the sale of the Hypotheca.

3.The defendant resisted the suit contending that the mortgage is not supported by consideration. No money was paid by the plaintiff on the date of the Mortgage. The plaintiff had lost his right to seek refund of advance since he was not ready and willing to perform his part of the contract. On the above contentions, the learned trial Judge, namely District Judge, Kancheepuram framed the following issues:

1.Whether the mortgage deed dated 23.08.2006 is supported by consideration?

2.Whether the plaintiff is entitled to payment of Rs.10,95,000/- along with an interest at the rate of 12% ?

3) To What other relief, the plaintiff is entitled to?

4.Upon consideration of the oral and documentary evidence, the learned trial Judge rejected the defence, upheld the validity of the mortgage and granted a Preliminary Decree. The defendant is on appeal.

5. I have heard Mr.K.Rajasekaran, learned counsel appearing for the appellant and Mr.Adithya Varadharajan, learned counsel appearing for Mr.N.Anand Venkatesh, learned counsel for the respondent.

6.Learned counsel for the appellant would contend that the mortgage is not supported by consideration and that it was the plaintiff who was not ready and willing to perform his part of the contract. Therefore, the plaintiff having lost his right to seek refund of advance as per the sale agreement, cannot seek a Preliminary Decree on the basis of the mortgage. The sale agreement is dated 01.06.2006 and the period for performance expires on 30.08.2006. The children of the defendant have issued a notice to the plaintiff as well as the defendant claiming a share in the properties which were the subject matter of the agreement. Therefore, there was cloud on the title of the defendant. The case of the plaintiff is that it was the defendant who came forward to execute the mortgage as he could not repay the advance amount immediately. The receipt of the advance is admitted. The defendant himself issued a notice to the plaintiff on 29.08.2006, admitting the mortgage and demanding cancellation of sale agreement and return of the same, so as to enable him to sell the property and repay the

mortgage amount. I do not think that the defendant can alter his case on the face of the admission made by him in Ex.B-7 which is a lawyer's notice. Therefore, I find that the learned District Judge-II, Kancheepuram had rightly rejected the defence and decreed the suit.

7.I do not see any reason to interfere with the factual findings of the learned Additional District Judge which are based on the oral as well as unimpeachable documentary evidence. Therefore, the appeal is dismissed, confirming the preliminary decree and judgment of the trial Court. Considering the facts and circumstances of the case, there shall be no order as to costs in this appeal. Consequently, the connected miscellaneous petition is closed.

03.02.2017

KP

Index: Yes/No

Internet:Yes/No

To

The learned District Judge,
District Court No.II,
Kancheepuram.

R.SUBRAMANIAN.,J.

KP

A.S.No.11 of 2012

03.02.2017