

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.02.2017

Coram

The Hon'ble Mr. Justice M.M.SUNDRESH

Second Appeal No.902 of 2015
and
C.M.P.No.1 of 2015

Manickam

..Appellant/Plaintiff

Vs

1.Dhanasekaran

2.Kannan

3.Minor Krishnan

Rep. by his next friend
and natural guardian
father Dhanasekaran

4. O.K.Sekar

..Respondents/Defendants 1to4

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 10.04.2015 passed in A.S.No.22 of 2012 on the file of the III Additional District and Sessions Judge, Salem reversing the judgment and decree dated 28.08.2006 made in O.S.No.72 of 2003 on the file of the Subordinate Judge, Mettur.

For Appellant

.. Mrs.Hema Sampath,
Sr.Counsel for Ms.Meenal

For Respondents

.. Mr.S.V.Jayaraman, Sr. Counsel
for Mr.T.Dhanasekaran - R1 to R3

Ms.V.J.Latha - R4

JUDGMENT

This second appeal is preferred against the judgment and decree dated 27.10.2014 made in A.S.No.22 of 2012 on the file of the III Additional District Judge, Salem.

2. This appeal has been preferred by the plaintiff in a suit for specific performance seeking reversing the judgment and decree rendered by the lower appellate Court which in turn set aside the judgment and decree passed by the trial Court for the following substantial question of law :

a. Whether in law the lower appellate Court failed to see that the execution of Ex.A.1 was duly proved by examining P.Ws.2 and 3 and that the appellant was entitled to specific performance?

b. Whether in law the lower appellate Court was right in overlooking the malafides of the respondents who protracted the proceedings by every stage when the appellant was ever ready and willing to perform his part?

3. It is the case of the plaintiff/appellant that an agreement was entered into between the parties under Ex.A.1 dated 28.03.2002. As the defendant is not ready and willing to execute the sale deed despite the payment of the advance amount mentioned therein, a legal notice dated 03.04.2003 was issued. On receipt of the same, the defendant issued Ex.A.4 dated 12.04.2003 by way of reply notice. A sale deed was executed by the defendants 1 to 3 in favour of the fourth defendant under Ex.A.5 dated 31.05.2003 prior to it. Under those circumstances, the suit has been laid.

4. The defendants inter alia contended that the agreement in Ex.A.1 has been created. The defendants 1 to 3 has also acknowledged the factum of executing the sale deed in favour of the defendant under Ex.A.5 corresponding to Ex.A.2.

5. The trial Court decreed the suit as prayed for placing reliance upon the evidence of P.W.1 to 3 which is inclusive of the attesting the witnesses. Incidentally also exercised his powers under section 73 of the Indian Evidence Act by making comparison of the signature found in Ex.A.1 with that of one available in the written statement and in other Court documents. The lower appellate Court reversed the judgment and decree of the trial Court by disbelieving the evidence of P.W.2 and 3 while exercising the said power under section 73 of the Indian Evidence Act once again.

6. On an appeal, this Court in S.A.No.459 of 2013 dated 10.04.2014 set aside the judgment and decree of the lower appellate Court in the following manner.

"14. The ratio laid down in the above referred judgments squarely applies to the facts and circumstances of the present case. The Apex Court held that the first appellate Court being a Court of facts should give a detailed reasoning at the time of reversing the finding of the trial Court.

15. Applying the ratio laid down in the above referred judgments, I am of the view that the judgment and decree passed by the lower appellate Court are liable to be set aside and the lower appellate Court should be directed to dispose of the appeal on merits and in accordance with law after taking into consideration the oral and documentary evidences let in by both sides.

16. In these circumstances, the 1st substantial question of law is decided in favour of the appellant. The judgment and decree of the lower appellate Court are set aside. The appeal in A.S.No.22 of 2012 is remitted to the III Additional District and Sessions Judge, Salem for fresh disposal on merits and in accordance with law and the lower appellate court is directed to dispose of the appeal on merits and in accordance with law after taking into consideration the oral and documentary evidence let in by the parties and dispose of the appeal within a period of four months from the date of receipt of a copy of this judgment.

17. Mr.S.V.Jayaraman, learned Senior Counsel appearing for the respondents 1 and 2 submitted that the parties may be given liberty to file an application before the lower appellate Court for comparing the signatures found in Ex.A.1 document with the admitted signature of the defendants.

18. Having regard to the submission made by the learned Senior Counsel appearing for the respondents 1 and 2, liberty is given to the parties to file appropriate application before the lower appellate Court for comparing the signatures found in Ex.A.1 agreement. It is open to either of the parties to file appropriate application before the lower appellate court and the lower appellate court shall take into consideration the report of the hand writing expert while deciding the appeal.

With these observations, the second appeal is allowed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed."

7. On remand, the defendants 1 to 3 filed an application seeking to send the disputed document to be compared with the admitted one by the handwriting expert. The handwriting expert gave a report stating that the signature in Ex..1 does not belong to the first defendant. The objections have been filed

by the plaintiff to the report of the handwriting expert and he was also examined and cross examined by the parties. The lower appellate Court once again found discrepancy in the evidence of P.W.2 and P.W.3 and this coupled with the report of the handwriting expert, dismissed the suit by reversing the judgment and decree of the trial Court. Hence, the present appeal.

8. The learned senior counsel for the appellant submits that the report and evidence of the handwriting expert being only a piece of evidence, the evidence given by P.Ws.2 and 3 will have to be given primacy. The first defendant has stated that in a drunken mood, Ex.A.1 must have been created and thus, it is in a way of admission by him. The expert has taken into consideration all the documents created subsequent to Ex.A.1 to A5 corresponding to Ex.B.2. Therefore, there is a procedure lacunae for it is a case of the plaintiff that the said document has been created by the parties. Hence, the judgment and decree of the lower appellate Court warrants interference.

9. The learned senior counsel for the defendants 1 to 3 submits that it is not as if the report has been taken a sole factor for dismissing the suit, but the discrepancies as found in the evidence of P.Ws.2 and 3 have also been taken into consideration. As there is no substantial question of law involved, no interference is required.

10. In a suit for specific performance, it is for the plaintiff to establish the two factors

- 1) Existence of the agreement for sale
- 2) Ready and willingness

11. The lower appellate Court found discrepancies in the evidence of P.Ws.2 and 3. While P.W.2 in his chief examination has stated that at the time of signing the agreement a sum of Rs.2,30,000/- has been paid. But in the cross examination, he has stated that he did not know how much amount was paid. He has also stated that the plaintiff and the first defendant did not say anything about the suit property in his presence. Coming to P.W.3, the lower appellate Court found that there is no clarity in his evidence since he has stated that he was not present at the time of negotiation and he was called thereafter. He also feigned ignorance about the terms. Similarly the Court below found discrepancies in the evidence of P.W.1 with that of P.Ws.2 and 3. In his evidence P.W.1 has stated that he along with the first defendant called the witnesses. However, P.W.3 has stated that it is the first defendant, who has called him and not the plaintiff. Thus, there exist some discrepancy in the evidence of P.Ws.2 and 3 and P.W.1.

12. The lower appellate Court has further found that it is neither logic nor practical to hold that after receiving a sum of Rs.2,30,000/- out of the total sale consideration of Rs.2,46,000/-, further thirteen months time is fixed for payment of the remaining paltry amount of Rs.16,000/-.

13. The above said findings by the lower appellate Court cannot be called as perverse. After all this Court is exercising its power under section 100 of the Code of Civil Procedure over a decision rendered by the lower appellate Court, which is the final Court of fact and law.

14. Coming to the evidence of D.W.1, it is to be seen as a whole. Merely because he has stated that the plaintiff would have created Ex.A.1 while he was in a drunken mood, it cannot be said that he has admitted his signature in Ex.A.1. As a defendant, it is open to him to take any number of pleas as he wants.

15. Substantial arguments have been made on the report and the evidence of the handwriting expert. The report and evidence of handwriting expert put together is a piece of evidence to be appreciated by the Court. Thus, there is nothing wrong in the Court in placing reliance upon it. The handwriting expert has given reasons for coming to his conclusion on the reference to the signatures found between the disputed document and the admitted documents. He has also been put into cross examination. It is not as if the lower appellate Court merely relied upon the evidence of the expert alone. It disbelieved the evidence of P.Ws.2 and 3 and there after relied upon the report of the expert. It has to be seen that it is the defendants 1 to 3 who have filed the application to send the documents to the expert and not the plaintiff. There was no objection at the time of sending the disputed document along with signature found in the admitted documents. Even assuming that Ex.A.4 corresponding to Ex.B.2 cannot be looked into for the aforesaid purpose, the expert has compared the other documents which are prior to the execution of Ex.A.1. Along with report under Ex.B.6, a reasoning sheet was also enclosed by the expert giving sufficient explanation for his conclusion. Thus the lower appellate Court has applied its mind for coming to the said conclusion. In such view of the matter, this Court does not find any substantial question of law available warranting interference.

16. In the result, the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

vrc

To

- 1.The III Additional District and Sessions Judge,
Salem.
- 2.The Subordinate Judge,
Mettur.
3. The Section Officer, VR Section, High Court, Madras.

+1cc to Mr.R. Meenal, Advocate, S.R.No.7518
+2ccs to Mr.T. Dhanasekaran, Advocate, S.R.No.7200
+1cc to Ms.V.J. Latha, Advocate S.R.No.7215

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