

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 30.01.2017

CORAM

THE HONOURABLE MR.JUSTICE R. SUBRAMANIAN

A.S.No.986 of 2009

1. R.Murugesan
2. M.Shanthi

...Appellants/Defendants

..Vs..

J.Selvi

...Respondent/Plaintiff

Prayer: Appeal filed Under Order 41 Rule 1 & 2 r/w under Section 96 CPC, against the judgment and decree dated 22.10.2008, passed in O.S.No.58 of 2007 on the file of the Additional District & Sessions Judge (Fast Track No.2), Salem.

For Appellants : Mr.Akilash
for Mr.T.Dhanasekaran

For Respondent : Mr.Siva Subramanian

JUDGMENT

The defendants who suffered a decree for specific performance, are the appellants herein. According to the plaintiff, the defendants had entered into a registered agreement of sale on 01.09.2006, for a total consideration of Rs.8,50,000/-. Under the said agreement, the plaintiff has paid a sum of Rs.8,10,000/- as advance and a period of 11 months was fixed for payment of the balance sale consideration and for execution of the sale deed. Though the defendants received a notice demanding execution of sale deed on 28.02.2007 they neither sent any reply nor did they come forward to execute the sale deed. On the above allegations, the plaintiff would seek a decree for specific performance.

2. The defendants resisted the suit, contending that the suit agreement was not intended to be an agreement of sale. According to the defendants, they had borrowed a sum of Rs.6,00,000/- from the husband of the plaintiff even in the month of May 2006 and handed over the original sale deed and

voter identity card to the husband of the plaintiff. It is at the instance of the husband of the plaintiff, the suit agreement came to be executed as security for the loan of Rs.6,00,000/-. It is contended that the husband of the plaintiff is a money lender.

3. On the aforesaid pleadings, the learned Additional District Judge, Fast Track Court II, Salem, has framed the following issues:

1. Whether the plea that the suit agreement was executed as a security for repayment of the loan of Rs.6,00,000/- obtained by the defendants from the husband of the plaintiff, is true?
2. Whether the plaintiff is not entitled to alternative relief of refund of Rs.8,10,000/- since the defendants have repaid more than Rs.4,00,000/- towards the principal and interest towards the said loan amount?
3. Whether the sale agreement dated 01.09.2006 is true and valid?
4. Whether the plaintiff is always ready and willing to perform her part of the contract?
5. Whether the plaintiff is entitled for specific performance or alternative relief of refund of advance of Rs.8,82,900/- with 12% interest?
6. To what other relief the plaintiff is entitled to?

4. On the side of the plaintiff, P.W.1 to P.W.3 were examined and Exhibits A1 to A6 were marked. D.W.1 and 2 were examined on the side of the defendants and there is no documentary evidence on the defendants' side.

5. On a consideration of the above said oral and documentary evidence, the learned Trial Judge rejected the case of the defendants that the suit agreement was not intended to be a sale agreement, and the same was executed as security for loan transaction. Considering the fact that the plaintiff has demonstrated her readiness and willingness throughout, the learned Trial Judge decreed the suit for specific performance. Aggrieved by the said Judgment and decree, the defendants have filed the above Appeal.

6. Heard Mr.Akilesh, for Mr.T.Dhanasekaran, learned counsel appearing for the appellant and Mr.K.Siva Subramaniam, learned counsel appearing for the respondent.

7. The following points arise for determination in this Appeal:

1. Whether the defendants have established the plea that the suit agreement was intended to be security for the loan transaction?

2. Whether the plaintiff has established that she has been ready and willing to perform her part of the contract?

8. The learned counsel appearing for the appellants would vehemently contend that the suit agreement is not intended to be a sale agreement and it was executed only for securing the loan transaction. He would further contend that the fact that the earlier agreement between one Periyasamy and the defendants, was cancelled just prior to the present agreement, would itself show that the sale agreement was not intended to be an agreement of sale. He also invited my attention to the oral evidence of D.W.1 who claimed that the handing over all the documents itself shows that the agreement was not intended to be acted upon.

9. On the other hand, the learned counsel appearing for the respondent/plaintiff would submit that the plea to the effect that the agreement was intended to be a security for the loan transaction, is an after-thought. The learned counsel pointed out the plaintiff issued a notice demanding performance on 26.02.2007, and the receipt of the said notice is acknowledged by the defendants on 28.02.2007. The suit came to be filed on 04.06.2007, nearly three months thereafter. Citing the absence of any reply notice, the learned counsel would contend that if only the claim of the defendants is true, they would have immediately sent a reply setting out the correct facts. According to the learned counsel the fact that there was no reply to the legal notice sent on 26.02.2007 itself would demonstrate that the present defence is only an after-thought to defeat the claim of the plaintiff.

10. I have examined the rival contentions and I have also gone through the documents as well as the evidence available on record. Apart from the examination of P.W.1, the plaintiff has also examined one Karupannan (P.W.2), who is the attestor of the the sale agreement dated 01.09.2006. The other attestor has been examined as D.W.2. Unfortunately, in the chief examination/proof affidavit, he has disclosed that he is a relative of the defendants. The said witness has travelled beyond the pleadings of the parties and had deposed that the plaintiff has received a sum of Rs.1,80,000/- from the defendants as a part of the compromise. At this juncture it should be pointed out that there is no pleading relating to the

said compromise and D.W.1 would also depose in her evidence that there was a Panchayat held and as per the said panchayat, they paid back a sum of Rs.1,80,000/- to the plaintiff. As already pointed out, there was no such plea in the written statement filed by the defendants.

11. In the written statement, it is the specific case of the defendants that they borrowed a sum of Rs.6,00,000/- and suit agreement came to be executed as security for the said borrowal. In cross examination, D.W.1 would depose that she had given instructions to file the written statement. She would depose that total amount borrowed is Rs.2,25,000/- and that she does not know the date of borrowing and she has not chosen to produce any material to show as to what was the amount repaid. She would further claim that 8 months before deposition, she repaid a sum of Rs.1,80,000/-. She was examined on 27.03.2008. The suit was filed on 02.06.2007. Therefore, the claim of repayment of Rs.1,80,000/- is just about when the suit came to be filed.

12. D.W.1 would also state that she does not know the value of the property in the area. The entire evidence of both D.W.1 and D.W.2 are against the pleadings rendering it unsafe to be relied upon. Therefore, the defendants have not established their plea that the agreement was executed under invalidating circumstances, namely as a security for the loan transaction and the same cannot be specifically enforced. The point is answered against appellants/defendants.

13. As regards the readiness and willingness on the part of the plaintiff, it is not seriously denied, at the same time, the suit being filed for specific performance, the plaintiff has to prove that she was ready and willing to perform her part of the contract. As it could be seen from the agreement entered on 01.09.2006, the plaintiff has paid major portion of sale consideration as advance and meagre portion namely Rs.40,000/- remains to be paid. In her evidence, P.W.1 has stated that there were tenants in the suit property, and the defendants wanted time to vacate them, hence, a period of 11 months was fixed for payment of the balance sale consideration. The said explanation is probable and reasonable. Despite a period of 11 months having been fixed under the agreement, the plaintiff issued notice within the said period on 26.02.2007, calling upon the defendants to execute the sale deed and the suit was filed on 04.06.2007.

14. In the above circumstances, I do not find any reason to differ from the conclusion of the Trial Court regarding the plaintiff's readiness and willingness for performing of her part of the contract. Therefore, both the points are answered

against the appellants/defendants. The appeal is dismissed, confirming the Judgment and decree of the Trial Court. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

Jv

To

The Additional District & Sessions Judge
(Fast Track No.2), Salem.

+1cc to Mr.Dhanasekar, Advocate, S.R.No.6067

+1cc to Mr.Hariharan, Advocate, S.R.No.6020

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