



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 09.08.2017

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

SECOND APPEAL (MD) No.185 of 2014

S.Valliammal

... Appellant / Plaintiff

Vs.

1.N.Lakshmanan

2.P.Kalavathy

... Respondents /Defendants

PRAYER: Appeal filed under Section 100 of C.P.C., against the judgment and decree, dated 29.11.2012, made in A.S.No.32 of 2012 by the learned the VI Additional District Judge, Madurai, confirming the judgment and decree, dated 19.04.2012, made in O.S.No.263 of 2008 by the learned Vth Additional Subordinate Judge, Madurai.

For appellant

... Mr.V.Janakiramulu

For respondents

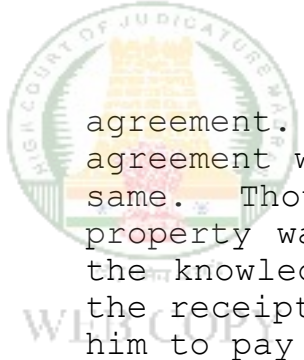
.... Mr.S.Parthasarathy

JUDGMENT

The plaintiff, who had lost both the Courts below, has preferred the present second appeal. The suit was filed for recovery of money based on the sale agreement.

2. The case of the plaintiff is that she and the first defendant entered into a sale agreement on 15.12.2003 for the sale of the suit mentioned property for a sum of Rs.4,85,000/-. As per the agreement, a sum of Rs.25,000/- was paid as advance and three months time was fixed for execution of the sale deed. It is stated by the plaintiff that on various dates, the first defendant had received a sum of Rs.2,70,000/- and totally, he had received Rs.2,85,000/-. In spite of receiving the said amount, the first defendant did not come forward to perform his part of contract. In the meanwhile, the first defendant had sold the property to the second defendant on 01.08.2004. As the property has already been conveyed by the first defendant, the plaintiff has filed the suit only for recovery of Rs.2,85,000/- with interest at 18% p.a. and also asked for a charge over the property.

3. The suit was contested by the first defendant on various grounds. The first defendant had admitted the execution of the sale agreement and also the receipt of Rs.25,000/- under the same. However, the payment of subsequent amounts, as mentioned under Exs.A2 to A5, are totally denied by the first defendant. Though three months time was fixed for the performance of the contract, as the first defendant is not ready and willing to do the same, the first defendant had sold the property to the second defendant. In fact, the first defendant claims that he was not furnished a copy of the



agreement. After repudiating the contract, when the original agreement was demanded to be returned, the plaintiff was evading the same. Though the agreement was entered into in the year 2003, the property was sold to the second defendant only in the year 2008 to the knowledge of the plaintiff. As the first defendant had denied the receipt of payments under Exs.A2 to A5, there is no liability on him to pay any amount to the plaintiff. Besides, the suit itself is barred by limitation. Hence, he prayed for dismissal of the Court.

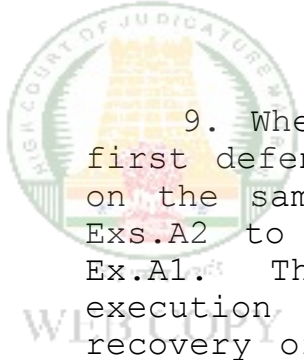
4.Before the trial Court, on the side of the plaintiff, three witnesses were examined as PWs.1 to 3 and six documents were marked as Exs.A1 to A6. On the side of the defendants, the first defendant himself was examined as DW1 and one document was marked as Ex.B1. After considering both the oral and documentary evidence, the Courts below have concurrently dismissed the suit.

5.At the time of admission, only notice was ordered.

6.Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents.

7.The learned counsel appearing for the appellant/plaintiff contended that Ex.A1 is not barred by limitation as the time is not the essence of contract and also in view of the subsequent payments made by the plaintiff. It was further contended that the first defendant had not denied the execution of Ex.A1 - sale agreement and also the receipt of Rs.25,000/- as advance. Having admitted the execution of Ex.A1 and the receipt of the advance amount, it is the specific case of the plaintiff that at-least the further sums paid to the first defendant ought to have been returned. It is also alleged by the plaintiff that instead of performing his part of the contract by executing a sale deed in favour of the plaintiff, the first defendant had received part payment on various dates even beyond the period of contract ie., on 16.04.2005. As the first defendant has sold the property to the second defendant, the plaintiff is entitled for at least refund of whatever the amount she has paid.

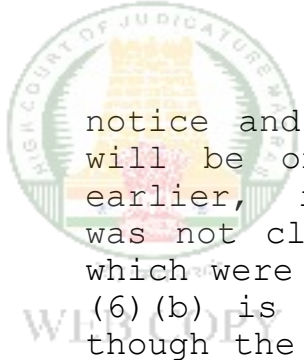
8. The prayer in the plaint is for directing the first defendant to pay a sum of Rs.4,37,190/- with interest on Rs.2,85,000/-. According to the plaintiff, the amounts paid to the first defendant were a sum of Rs.50,000/- on 14.05.2004 under Ex.A2; a sum of Rs.2,00,000/- on 25.05.2004 under Ex.A3; a sum of Rs.20,000/- on 14.08.2004 under Ex.A4; a sum of Rs.15,000/- on 16.04.2005 under Ex.A5; and in all Rs.2,85,000/-. The first defendant has specifically denied the receipt of amount under Exs.A2 to A5 and also disputed his signature found on the same. However, the execution of Ex.A1 agreement and also the receipt of Rs.25,000/- as advance are not denied by the first defendant. Curiously, the plaintiff has not asked for the return of the admitted sum of Rs.25,000/-, whereas what has been now demanded is only those amounts paid under Exs.A2 to A5.



9. When there is an agreement, which is also admitted by the first defendant, any further payments would have been written only on the same document, but there is no reason assigned as to why Exs.A2 to A5 were alleged to have been executed independent of Ex.A1. The plaintiff also has not taken any steps to prove the execution of Ex.A1. Therefore, the claim of the plaintiff for recovery of the said sum of Rs.2,85,000/- was rightly rejected by the Courts below. Even assuming that the money said to have been paid under Exs.A2 to A5 are true, unless otherwise it is proved that the same were only pursuant to the sale transactions, the question of creating a charge over the property does not arise.

10. Though the sale agreement was executed on 15.12.2003, admittedly, the plaintiff had not paid any further sum excepting those under Exs.A2 to A5. Even assuming that the payments were made only towards the sale agreement, Ex.A5 is, dated 16.04.2005, which is much later to the execution of Ex.A1, which goes to show that the plaintiff was never ready and willing to perform his part of the contract at the earliest. The first appellate Court, as a final fact finding Court, has found that the plaintiff herself did not know who had written those receipts viz., Exs.A2 to A5. Even in the deposition of the plaintiff, she has answered incoherently about the execution of Exs.A2 to A5. Thus, considering the demeanor of the witness, the Courts below had rightly found that Exs.A2 to A5 are not proved in the manner known to law. There is also no satisfactory explanation as to why the plaintiff has given up the payment of Rs.25,000/- which was, in fact, admitted by the defendant. In the above conspectus of the case, the plaintiff is not entitled for refund of the amount.

11. Another aspect raised by the plaintiff to be considered is whether the plaintiff is entitled for unpaid vendor's lien. So far as the agreement is concerned, though three months time is fixed for the performance of contract, it is the settled principle that time may not be the essence of contract. However, the plaintiff ought to have filed the suit for specific performance within three years, which is the statutory limitation period. But, the suit itself filed only for return of money. Hence, there is no averment with respect to the readiness and willingness of the plaintiff. There is also no evidence to show that there were steps taken by the plaintiff for the performance of the contract. The further payments under Exs.A2 to A5 were also disbelieved by the Courts below. Therefore, it is to be taken that the receipts under Exs.A2 to A5 are created for the purpose of the case and the contention of the plaintiff that she was ready and willing to perform her part of the contract cannot be accepted. The effort of the plaintiff is to substitute her own pleadings by subterfuge. The first defendant also has sold the property to the second defendant, after the period of three years. As per Section 55 (6)(b) of the Transfer of Property Act, the same is applicable only when the subsequent purchaser is noticed and there should also be pleadings to the effect that the subsequent purchaser had obtained the property with



notice and then only a charge decree can be made. Otherwise, it will be only a simple suit for recovery of money. As stated earlier, in this case, the advance amount under the document Ex.A1 was not claimed by the plaintiff and only the subsequent payments which were not proved are sought to be recovered. Hence, Section 55 (6) (b) is not applicable to the facts of the present case. Thus, though the case of the plaintiff is attractive, at the first blush, on a closer scrutiny, there are cracks within. Hence, the second appeal is devoid of any merits, as it does not raise any question of law to be considered.

12. In the result, this second appeal fails and the same is, accordingly, dismissed, confirming the judgment and decree passed by the Courts below. No costs.

Sd/-

Assistant Registrar (CRL.SIDE)

/True Copy/

Sub Assistant Registrar

To

1.The VI Additional District Judge,
Madurai.

2.The Vth Additional Sub Judge,
Madurai.

+1cc to Mr.S.PARTHASARATHY Advocate in SR. No.71415

+1cc to Mr.V.JANAKIRAMULU Advocate in SR. No.72281

GCG

JS/MR.KKR/SAR.4/23.08.2017/4P-5C

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