

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 06.06.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.306 of 2018
and C.M.P.No.8484 of 2018

D.Prakash

.. Appellant/Plaintiff

Vs.

1.G.Palaniammal

2.S.N.Loganathan

.. Respondents/Defendants

PRAYER: Second Appeal is filed under Section 100 of C.P.C against the judgment and decree dated 13.12.2017 made in A.S.No.38 of 2017 on the file of the Principal District Court, Erode confirming the judgment and decree dated 29.11.2016 made in O.S.No.397 of 2011 on the file of the II Additional Subordinate Court, Erode.

For Appellant : Mr.R.Ganesh Kumar

J U D G M E N T

Second Appeal is filed against the judgment and decree dated 13.12.2017 made in A.S.No.38 of 2017 on the file of the Principal District Court, Erode confirming the judgment and decree dated 29.11.2016 made in O.S.No.397 of 2011 on the file of the II Additional Subordinate Court, Erode.

2.The appellant is the plaintiff and respondents are the defendants in O.S.No.397 of 2011 on the file of the II Additional Subordinate Court, Erode. The appellant is the plaintiff who lost in both the Courts below. He filed the above suit for specific performance of agreement of sale dated 09.04.2008. According to the appellant, the first respondent is the owner of the suit property. She appointed the second respondent as her Power Agent to deal with the property. The second respondent entered into an agreement of sale with the appellant on 09.04.2008, agreeing to sell the property for a total sale consideration of Rs.3,00,000/- and received a sum of Rs.1,50,000/- towards advance cum part of sale consideration. The contract was fixed to be concluded within a period of one year. The appellant was always ready and willing to perform his part of the contract from the date of the agreement.

2(a).The appellant came to know about the mortgage created by the first respondent over the suit property in favour of M/S.Sri Ram Chit Funds, Tamil Nadu and requested the

second respondent to discharge the mortgage. The second respondent informed the appellant to contact the first respondent. The first respondent gave evasive reply when the appellant contacted her. The appellant issued a notice dated 09.03.2010 to the first respondent for which the first respondent sent a reply dated 22.03.2010, making false allegations. The first respondent took steps to discharge the mortgage on 09.07.2010. When the appellant approached the first respondent for completion of contract on 19.10.2011, the first respondent informed him to seek remedy through Court. Hence, he has filed the suit.

3.The first respondent filed written statement and submitted that she gave the suit property as collateral securities for the amounts borrowed by one Vajravel from M/s. Sri Ram Chit Funds. According to the first respondent, she executed the Power of Attorney only to maintain the property and not for sale and also submitted that it is only a sham Power of Attorney. The said Vajravel did not discharge the loan taken by him from M/s.Sri Ram Chit Funds. M/s. Sri Ram Chit Funds was taking steps to sell the property by public auction. First respondent and her son discharged the loan. The first respondent has no intention to sell the property to appellant. The first respondent cancelled the Power of Attorney against the second respondent on 18.03.2010 and hence the suit filed by the appellant is barred by limitation.

4.The second respondent remained exparte before the Courts below.

5.Based on the pleadings, the learned Trial Judge framed necessary issues. Before the learned Trial Judge, the appellant examined himself as P.W.1 and marked 8 documents as Exs.A1 to A8. The first respondent examined herself as D.W.1 and one Mohanasundaram was examined as D.W.2 and marked 6 documents as Exs.B1 to B6. The learned Judge considering the pleadings, oral and documentary evidence, dismissed the suit, holding that appellant has not proved payment of advance amount to the first respondent and he has not proved his readiness and willingness to perform his part of the contract within the time limit and is not entitled to any relief of specific performance.

6.Against the said judgment and decree dated 29.11.2016 made in O.S.No.397 of 2011, the appellant filed A.S.No.38 of 2017. The learned I Appellate Judge framed necessary points for consideration. Considering the judgment of the learned Trial Judge, points for consideration and arguments of the counsel for the parties, dismissed the Appeal, confirming the judgment and decree of the Trial Court.

7.Against the said judgment and decree dated 13.12.2017 made in A.S.No.38 of 2017, the appellant has come out with the present Second Appeal.

8.The learned counsel for the appellant contended that the existence of mortgage over the suit property is not a bar for alienating the suit property. An agreement of sale executed by the Power of Attorney will not become invalid after cancellation of the Power of Attorney. The second respondent has admitted the sale agreement and receipt of Rs.1,50,000/- as advance out of total sale consideration of Rs.3,00,000/-. The Courts below failed to appreciate the presumption in favour of the registered document in the absence of substantial evidence to rebut the said presumption. Without any pleadings of collusion and fraud, the Courts below erred in holding that sale agreement is not binding on the first respondent. The Courts below failed to see that only after the notice dated 09.03.2010, the first respondent discharged the mortgage over the suit property on 09.07.2010 created in favour of M/s.Sri Ram Chit Finance. After discharge of the mortgage, the appellant has filed the suit for specific performance in the month of October 2011 stating that he was always ready and willing to perform his part of the contract.

9.Heard the learned counsel for the appellant and perused the materials available on record.

10.The suit is for specific performance of agreement of sale dated 09.04.2008. The said agreement was entered into between the appellant and first respondent through her Power Agent, second respondent. The appellant has paid a sum of Rs.1,50,000/- as advance and balance sale consideration has to be paid within one year from the date of the agreement i.e., 09.04.2008. It is admitted by the appellant that if he fails to pay the balance sale consideration within one year from the date of agreement of the sale, the advance sum of Rs.1,50,000/- will be forfeited. In spite of such clause, the appellant has not called upon the respondents to receive the balance sale consideration of Rs.1,50,000/- before expiry of time i.e., before 08.04.2009, the time fixed in the agreement of sale. The appellant sent notice only on 09.03.2010, almost 13 months after the expiry of the time limit fixed in the agreement of sale. The first respondent sent reply on 22.03.2010, which according to the appellant contained false allegations. In spite of the same, the appellant has not filed suit immediately. He filed suit only on 08.11.2011, after 3 years and 7 months from the date of agreement of sale.

11.The Courts below have considered Ex.B6, copy of sale deed dated 21.01.2010 which was admitted by the appellant, whereby a property was sold and he has also received a sum of Rs.11,86,000/-. After receipt of the said amount in January 2010 only, the appellant has stated that he contacted the first respondent in last week of February 2010 and issued notice on 09.03.2010. The Courts below considering Ex.B6, came to the conclusion that before such sale on 21.01.2010, the appellant did not have any money to perform his part of

contract. The Courts below, considering the above facts and the fact that appellant has approached the Court for specific performance of agreement of sale after 3 years and 7 months from the date of agreement and after 2 years and 7 months of expiry of time limit fixed, dismissed the suit and Appeal. There is no error in the said judgment and decree warranting interference by this Court. No question of law much less than the substantial question of law has arisen in this Second Appeal.

12.In the result, this Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

gsa

To

- 1.The Principal District Judge, Erode
- 2.The II Additional Subordinate Judge, Erode.

+1cc to Mr.R.Ganesh Kumar, Advocate SR.No.35428

SAI(CO)

sm:2.7.2018

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