

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 29.06.2018

Coram

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

C.S.No.279 of 2015 and
A.No.4069 & 7491 of 2017
and A.No.6657 of 2015

CRL. O.P.No.11751 of 2017

&
Crl. M.P. Nos.7690 & 7691 of 2017

in C.S.No.279 of 2015:

Mr. Prakash Chand Jain

... Petitioner

Vs.

1. M. Muniya
2. V. Subbaiah

... Respondents

in CRL. OP. NO.11751 of 2017:

V. Subbiah

... Petitioner

Versus

M. Ganapathy @ Muniya

... Respondent

PRAYERS:

In C.S. No.279 of 2015:

Civil Suit has been filed to pay to the plaintiff a sum of Rs.36,97,700/- together with future interest at the rate of 24% per annum on Rs.36,97,700/- from the date of plaint till realization.

In CRL. OP. No.11751 of 2017:

This Criminal Original Petition has been filed to call for the records pertaining to the C.C.No. 4935 of 2015 on the file of the learned XVIIth Metropolitan Magistrate, Saidapet.
In C.S. No.279 of 2015

For Plaintiff : Mr. K. Lavan

For D1 : No Appearance

For D2 : A. Gunaseelan

In CRL. O.P. No.11751 of 2017

For Petitioner : Mr. R. Mohan

For Respondent : No Appearance

JUDJMENT

When the suit C.S. No.279 of 2015 along with its connected applications and Criminal Original Petition No.11751 of 2017 are posted today, it is stated that the suit and Criminal Original petition are similar in nature and connected with each other. Hence, they are taken up together for disposal.

2. While the Suit in C.S No.279 of 2015 is filed against the First and second defendant for recovery of money, Crl. O.P. No.11751 of 2017 is filed by the Second defendant to quash the Criminal proceedings in C.C. No.4935 of 2015 on the file of XVII Metropolitan Magistrate, Saidapet which has been filed by the first defendant. Both the cases are posted today before this Court for final disposal and the case has chequered history.

3. Originally, the plaintiff has filed the suit in C.S. No.279 of 2015 for recovery of money on the basis of mortgage deed, dated 20.09.2002 and on the basis of undertaking deeds, dated 25.01.2006 and 24.05.2006. While the property had already been mortgaged in favour of the plaintiff, the first defendant had transferred the property in the name of the second defendant for valuable consideration. Though a sum of Rs.34,52,000/- (Thirty four lakhs and Fifty thousand only) said to have been paid on the execution of the sale deed dated 22.11.2010, the sale deed has been registered only on 24.02.2011. It appears that during the registration of the sale deed, there is a dispute between the first defendant and the second defendant with regard to the sale consideration. Hence, they mutually agreed to pay another sum of Rs. 29,00,000/- (Rupees Twenty nine lakhs only) provided the possession of the property along with original document are handed over to the second defendant towards such payment of 29,00,000/-. The second defendant has issued Post Dated Cheques which was the subject matter of the Criminal proceedings in C.C. No. 4935 of 2015 on the file of the XVII Metropolitan Magistrate, Saidapet.

4. In this suit, the plaintiff has filed an application in O.A. No.394 of 2015 for grant of interim injunction restraining the second defendant from encumbering and alienating the suit property. This Court granted interim injunction as prayed for in O.A. No.394 of 2015.

5. Subsequently, the second defendant has filed an application in A.No.6657 of 2015 before this Court to vacate the interim order expressing his desire to show his bona-fide to deposit a sum of Rs.29,00,000/- before this Court. It is to be noted that in the meanwhile, considering the fact that the first defendant has not preferred to hand over the possession of the property along with original parent documents, the second defendant has issued instructions to the bankers to stop payment of cheques for Rs.29 lakhs issued to the first defendant for balance sale consideration. Accordingly, when the cheques were presented by the First defendant to the respective Bank, they got dishonoured which gave rise to the first defendant in filing the Criminal case in C.C. No. 4935 of 2015 on the file of the XVII Metropolitan Magistrate, Saidapet, against the second defendant herein.

6. This Court by an order dated 16.11.2016 directed the second defendant herein to deposit a sum of Rs.29 lakhs to the credit of C.S. No. 279 of 2015 on the file of this Court. Accordingly, the second defendant has deposited the amount into Court. Thereafter, the application No.4069 of 2017 has been filed by the plaintiff seeking to withdraw payment out of Rs.29 lakhs in the Court deposit. Even though the First defendant was served and notices were issued through Court as well as privately for several occasion, the first defendant had not appeared in the judicial proceedings.

7. By order date 30.10.2017 of this Court, it was observed that as there is no representation on behalf of the first respondent, the matter was adjourned on 20.11.2017. Thereafter, this Court by order dated 06.12.2017 in A.No.4069 & 7491 of 2017 has passed the following orders.

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" 2. The learned counsel for the first defendant has appeared today and stated that the first defendant has taken the entire bundle from him and accordingly, he is handicapped from representing the Court.

3. An affidavit of service had been filed indicating the service of notice to the first defendant. It is seen that notice to the first defendant had been served and returned with endorsement redirected to the correct address. It is also seen that an intimation was also delivered to the first defendant. It is clear that the first defendant is engaging dilatory tactics to avoid appearance before the Court and at the same time changing his counsel. The learned counsel who appears for the first defendant today is certainly handicapped and has filed a memo to that effect.

4. From the affidavit of service filed, it is seen that notice has been served and it has been returned with an endorsement as refused, which means that the first defendant does not want to pursue the matter before this Court. It is for the first defendant, if he is interested to pursue the matter to appear before this Court or to stand outside and avoid participating on the proceedings. It is made clear that orders shall be passed whether he chooses to appear or not.

5. Affidavit of service filed by the learned counsel for the plaintiff and the second defendant is taken on file and recorded.

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7. Registry is directed to print the name of the first defendant and his address in the cause list for the hearing on 15.12.2017."

8. Subsequently, by order dated 02.02.2018 in C.S. No.279 of 2015, this Court has passed a detailed order with respect to the conduct of the first defendant. Thereafter, the first defendant has initiated criminal proceedings under section 138 of Negotiable Instruments Act against the second defendant. The second defendant has filed Criminal O.P. No.11751 of 2017 under Section 482 to quash the criminal proceedings pertaining to the C.C. No.4935 of 2015 on the file of the learned XVII Metropolitan Magistrate, Saidapet. It is also posted before this Court for disposal along with the suit in C.S. No.279 of 2015.

9. From the facts narrated above, it makes clear that the first defendant has executed mortgage in favour of the plaintiff for having borrowed money. In the meanwhile, the first defendant has sold the property to the second defendant by Sale deed. Such being the transaction, the second respondent has deposited a sum of Rs.29 Lakhs in order to establish his bona-fide to safeguard the interest of mortgagor as per order dated 16.11.2016 passed by this Court. Now, the plaintiff in this case also filed a memo stating that the plaintiff agrees and accepts to receive Rs.29 Lakhs deposited into this Court to the credit of the present suit as full and final settlement as against the suit claim of Rs.36,97,700/- and hand over the original sale deed dated 16.07.2001 to the second defendant. To that effect, he has preferred to withdraw the suit. The memo is also taken as record.

10. However, the first defendant avoiding the court proceedings for the reasons best known to him despite several adjournments granted to him and service of notices effected to him. He has filed a complaint on the basis of cheques which were

issued by the second defendant during the sale transaction. The complaint filed by the first defendant in C.C. NO.4935 of 2015 on the file of the XVII Metropolitan Magistrate, Saidapet, indicates that the cheques were issued towards balance amount of Rs.29 lakhs which was agreed between the parties. It is further to be noted that prior to the filing of complaint, a legal notice was also issued by the first defendant to the second defendant on 05.12.2014 wherein it was specifically stated that the cheques were issued towards balance of sale consideration of Rs. 29 lakhs.

11. It was contended by the second defendant that an amount of Rs.29 lakhs was retained only towards discharge of mortgage executed in favour of the first defendant as he came to know about mortgage only after the registration of the sale. Thereafter, it appears that complaint has been filed before XVII Metropolitan Magistrate, Saidapet, against the second defendant under Section 138 of the Negotiable Instrument Act. It appears that there is dispute with regard to original sale consideration agreed between the parties.

12. Though the registered sale deed did not reflect different consideration, the exchange of notice and allegation made in the Criminal complaint clearly indicates that actual dispute is only in respect of balance sale consideration for execution of the sale deed. It was agreed to pay further sum of Rs.29 lakhs which resulted in issuing the cheques by the second defendant.

13. The suit filed by the plaintiff for recovery of money under mortgage deed, the second defendant has deposited the above amount payable by the first defendant to the credit of the Court, before that the second defendant has given instruction to stop payment of the cheques issued by him. It is to be noted that the second defendant has stopped the payment only after realising the encumbrance over the property and also possession along with original documents has not been handed over to him. Therefore, he deposited the amount before this Court for clearing encumbrance. To deny above allegations despite several opportunities given by this Court, the first defendant adopting dilatory tactics which clearly shows that there is no further payment whatsoever to be paid to him. Only towards the balance consideration the second defendant issued cheques in favour of the first defendant.

14. Considering the totality circumstances of the same, I am of the view that the first defendant could not maintain criminal proceedings as against the second defendant as the entire money covered in the cheques which has been deposited before this Court in the Suit. The first defendant executed sale by suppressing the existing mortgage and even now avoiding to come before this

Court. His conduct indicates that criminal proceedings filed by the first defendant is an abuse process of law and it is only vexatious. I am of the view that since entire amount was deposited in this suit, the prosecution need not continue as against the second defendant. If such complaint/proceedings allowed to continue, it is sheer waste of time causing hardship to the second respondent. Accordingly, this Court of the view is that the complaint filed by the first defendant under Section 138 of Negotiable Instrument Act, against the second respondent liable to be quashed. Similarly, the first defendant did not appear before this Court and this suit is filed for a sum of Rs.36,97,700/- and now the plaintiff has accepted to receive a sum of Rs.29 lakhs and memo has been filed in this regard. Taking into consideration age of the plaintiff and conduct of the first defendant who has not denied mortgage and remaining ex-parte, the suit itself could be disposed of without any trial. Accordingly, the suit is decreed for a sum of Rs.29 lakhs in full quit and consequently, Connected applications are closed. No Costs.

15. After the receipt of the payment, the plaintiff shall hand over the original documents relating to the property to the second defendant and to intimate the same to the Registrar concerned office.

16. Accordingly, Criminal proceeding initiated by the First defendant against the second defendant in C.C. No.4935 of 2015 on the file of XVII Metropolitan Magistrate, Saidapet is quashed. Consequently connected miscellaneous petition is closed.

s/d-
Assistant Registrar (CS VI)

True Copy

Sub-Assistant Registrar

lbm

To

1. The XVII Metropolitan Magistrate
Saidapet.
2. The Sub Assistant Registrar
Original Side, High Court, Madras 104.
- +2 CC to Mr. R. Mohan, Advocate sr 61477

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SP (05/09/2018)