

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.02.2018

CORAM:

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.479 of 2015
and M.P.No.1 of 2015

A.Yaostha

.. Appellant/Appellant/Defendant

Vs.

K.Arumugham

..Respondent/Respondent/Plaintiff

Prayer : Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgement and decree dated 23.06.2014 made in A.S.No.17 of 2014 on the file of the Principal District Judge, Coimbatore, confirming the judgement and decree dated 14.07.2006, in O.S.No.579 of 1999 on the file of the II Additional Subordinate Court, Coimbatore.

For Appellant : Mr.J.Hariharan
for M/s.V.Nicholas

For Respondent : Mr.Mukunth
for M/s.Sarvabhauman Associates

J U D G E M E N T

The defendant in the suit for specific performance, aggrieved by the unanimous decisions of the Courts below, has preferred the above second appeal.

2. The plaintiff, admitting the ownership of the defendant, had entered into an agreement on 15.04.1998 for sale of the suit property for a total consideration of Rs.2,10,000/- (Rupees two lakhs and ten thousand only) and an advance of Rs.2,00,000/- (Rupees two lakhs only) was paid on the same date. The balance consideration of Rs.10,000/- (Rupees ten thousand only) was to be paid within an year and complete the sale. The defendant also agreed to handover the original sale deed and possession of the property. Despite the plaintiff being ready and willing to perform his part of the contract, the defendant was not extending his co-operation. Hence, after issuing the suit notice, the suit was filed.

3. Denying the averments giving rise to the cause of action to the suit, the defendant had stated that the plaintiff is a

moneylender and she only borrowed a sum of Rs.1,00,000/-, as hand loan from him. At the instance of the plaintiff, the loan was secured by creating a mortgage over the property and accordingly, title deeds were also handed over to the plaintiff. It is the next contention of the defendant that she, being a Malayalee, not very well acquainted with the Tamil language and taking advantage of the same, the plaintiff has brought out the sale agreement, which was intended to be only a mortgage deed.

4. Before the Trial Court, the plaintiff got himself examined as P.W.1 and examined one Palaniammal as P.W.2. Exs.A.1 to A.7 were marked on his side. On side of the defendant, D.Ws.1 to 3 were examined and Exs.B.1 to B.3 were marked.

5. On considering the above pleadings, the Courts below have concurrently held that the plaintiff is entitled for decree for specific performance. Aggrieved by the same, the second appeal is filed.

6. At the time of admission, the following substantial questions of law were formulated by this Court for consideration :

a. Whether the payment of advance amount was 95% of the alleged sale consideration i.e. Rs.2,00,000/- out of Rs.2,10,000/- and the payment of a meagre sum of Rs.10,000/- within a period of one year would establish that it is only a loan transaction whether the courts below are correct in granting the relief of specific performance ?

b. A prudent person would not pay Rs.2,00,000/- as advance out of Rs.2,10,000/- without even verifying the marketable title of the property and agreed to pay the meagre balance amount of Rs.10,000/- on perusing the documents of the title whether the judgement and decree for specific performance granted by the courts below are not perverse and contrary to the evidence on record ?

c. Whether the scope of O.S.No.555 of 2014 was confined regarding permanent injunction restraining the defendant from alienating the suit property and that in O.S.No.579 of 1999 is for specific performance and thus the scope of the two suits are different whether the lower appellate court is correct in holding that the failure to file the appeal against the decree in O.S.No.555 of 2014 would operate as res judicata?"

7. The first contention of the learned counsel for the appellant/defendant is that if the respondent/plaintiff had parted with more than 95% of the sale consideration, that is, Rs.2,00,000/- out of the agreed sum of Rs.2,10,000/-, he would not have taken more than an year for paying the balance sum of Rs.10,000/- to get the sale deed executed in his name. It is also contended that the suit property was more than Rs.5,00,000/- worth on the date of the alleged agreement, and as it was intended to be given only as a security, there was no agreement to sell executed by the appellant/defendant. It is also pointed out by the learned counsel for the appellant/defendant that Ex.A.1 agreement comprises of four sheets and on the second sheet only half of the page was written and the other half page was left blank and the third and fourth sheets were written without leaving unnecessary space. This has encouraged the appellant/defendant to state that the blank papers, on which, the appellant/defendant had signed were converted into an agreement by the respondent/plaintiff. The appellant/defendant also had admitted that a sum of Rs.1,00,000/- was taken by her on the date of agreement. The said agreement - Ex.A.1 was also attested by the daughter of the appellant/defendant and another person by name Subash Babu, who had been examined as D.W.3.

8. In response to the above contentions, learned counsel for the respondent/plaintiff would submit that the execution of Ex.A.1 was not denied by the appellant/defendant. Having executed the agreement, which is not disputed or denied, the burden is automatically on the appellant/defendant to discharge the same by cogent evidence. Even in the written statement, the appellant/defendant had not pleaded that she had left signed blank papers with the plaintiff, and that, the same was misused by the respondent/plaintiff. It is relevant to state that Ex.A.1 is a registered document and both the plaintiff and the defendant had gone to the Sub Registrar Office, to get the same registered. It is not denied or disputed by the appellant/defendant that she was forcibly taken to the Sub Registrar Office to get Ex.A.1 signed. As stated earlier, D.Ws.2 and 3 are the attestors to the document. D.W.2 is the daughter of the defendant, who had also attested Ex.A.1. It is also found by the Courts below that the title deed of the defendant in Ex.A.6 dated 21.10.1992 is in Tamil and when the appellant/defendant had purchased the property under Ex.A.6, which is a registered document written in Tamil, she cannot claim ignorance of the language, when Ex.A.1 was executed and registered.

9. The Courts below also have discredited the evidence of D.W.3, who is a person introduced the appellant/defendant to the respondent/plaintiff for the purpose of borrowing the money. He is one of the attestors to Ex.A.1. However, in the cross-

examination, he also categorically admitted that he had not seen or it is not known whether the defendant borrowed money from the plaintiff. D.W.2's evidence was brushed aside, being an interested witness, as she is the daughter of the first defendant. Hence, the evidence of D.Ws.2 and 3 were disbelieved and discarded as not useful by the Courts below and the validity of Ex.A.1 was upheld.

10. Yet another contention raised by the appellant/defendant is that earlier a suit was filed by the respondent/plaintiff in O.S.No.2124 of 1998 for permanent injunction restraining the appellant/defendant from alienating the suit property and on transfer to Subordinate Court, it was renumbered as O.S.No.555 of 2014. The said suit was decreed in favour of the respondent/plaintiff and the suit was based only on Ex.A.1 agreement and both the suits were tried in common. The defendant, who is the appellant herein, had filed only one appeal against O.S.No.579 of 1999 initially. Subsequently, an attempt was made to file an appeal against O.S.No.555 of 2004 by filing an application to condone the delay. The same was dismissed and the order challenging the same in C.R.P.No.1815 of 2010 was allowed on terms. However, it appears that there was no appeal filed by the defendant against the other suit. Hence, it is found that in so far as findings with respect to the agreement - Ex.A.1, based on which both the suits were filed, would operate as res judicata.

11. As stated supra, the burden is on the defendant to prove that though Ex.A.1 is admitted to have been executed, it was not intended to be what it is. Though, it is argued by the learned counsel for the appellant that the plaintiff had postponed the sale for payment of a meagre sum of Rs.10,000/-, there is absolutely no evidence let in by the defendant, to show that it was only a money transaction and that she made attempts to repay the loan, which she borrowed and take back the documents. From the conspectus of the above facts, it can be held that Ex.A.1 is a genuine document executed by the appellant/defendant, though it was initially denied, and when the plaintiff had established that the defendant had come to the Registrar office to execute the sale agreement and the same was registered, the burden is shifted on the defendant which was not discharged.

12. The next contention is that the second page of the agreement was only half filled up. It is not the defendant's case that there was no continuity on the third page. Admittedly, the defendant had signed on each page including the alleged half blank second paper. Having not raised any objection at the time of signing each page, the defendant is estopped from raising the same at the later point of time.

13. Even the point of ignorance of Tamil language is also held against her, as her title deed itself is in Tamil. Thus, when the plaintiff had categorically proved the execution of Ex.A.1, sale agreement and the passage of consideration and his readiness and willingness to pay the balance of the sale consideration, he is entitled to the relief prayed, which was granted by the Courts below.

14. The defendant having failed to discharge the burden cast upon her cannot have indulgence from this Court and the questions of law formulated are answered against the appellant/defendant.

15. The Second Appeal is, accordingly, dismissed confirming the judgment and decree of the Courts below. There shall be no order as to costs. Consequently, connected miscellaneous petition shall stand closed.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

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To

1. The Principal District Judge,
Coimbatore.
2. The II Additional Subordinate Court,
Coimbatore.
- 3.The Section Officer,
VR Section,
High Court, Madras.

+ 2 cc to M/s.Sarvabhauman Associates Advocate,SR.13704 & 12248

+ 1 cc to M/s.V.Nicholas Advocate,SR.13432

S.A.No.479 of 2015

rsk(co)
nr 12/03/2018