

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.12.2019

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

A.S.No.417 of 2018

1.C.Gunasekaran
2.Valliammal

..Appellants/Defendants

Vs.

P.Selvaraj

..Respondent /Plaintiff

Prayer : First Appeal filed against the Judgment & Decree dated 20.11.2017 passed in O.S.No.209 of 2015 on the file of the Second Additional District Judge, Erode.

For Petitioner : Mr.R.Prabakar
For Respondent : Not ready in notice

O R D E R

The original suit was instituted for specific performance of the agreement, and delivery of possession of the suit property, or in the alternative relief for return of the advance amount with interest, and for costs.

2. The suit was partly decreed in favour of the plaintiff, as the relief sought for specific performance was rejected and the alternative relief of repayment of advance amount was decreed. The appeal suit was filed by the defendants/appellants. The respondent/plaintiff instituted the suit by stating that the suit property is situated in Murungatholuvu Village, Perundurai Taluk. The suit property partly belongs to the 1st defendant by a sale deed dated 13.10.2008, and the other part belonged to the father of the 1st defendant, and was inherited by the defendants by succession, as legal heirs, and they proclaimed to sell the suit properties, and the plaintiff wanted to purchase the same. Therefore, the plaintiff negotiated with the defendants and they agreed to sell the suit property for a sum of Rs.12,00,000/- and an advance amount of Rs.11,00,000/- was paid by the plaintiff to the defendants on 17.10.2012. A registered sale agreement was also entered into between them. It was agreed to complete the sale within three years, since there were standing crops, in which the defendants wanted to harvest. From the date of agreement, the plaintiff was always ready to perform his part of the agreement to pay the balance amount of Rs.1,00,000/- and get

the sale deed in his favour, free of all encumbrances. But the defendants were evading the execution of the agreement, despite the fact that the plaintiff made several demands in this regard. Thus, the plaintiff issued two notices to the defendants on 15.06.2015 and 18.06.2015, calling upon them to receive the balance amount and execute the sale deed. The defendants sent a reply notice and denied the contentions in the notices issued by the plaintiff. Further, replied that the said allegations are false, frivolous and vexatious. Thus, the plaintiff was constrained to institute the civil suit.

3. The appellants/defendants in their written statement denied the plaint averments and it was contended that the suit itself is not maintainable. The defendants never agreed to sell the suit property to the plaintiff for a sum of Rs.12,00,000/- and did not receive an advance amount of Rs.11,00,000/- from the plaintiff, agreeing to complete the sale within 3 years. There is no sufficient water source to the suit property to cultivate sugar cane or Plantain as alleged in the plaint. The other contention is that the plaintiff was always ready to perform his part of the agreement by paying the sale consideration of Rs.1,00,000/-, was also denied. The agreement was not executed with an intention to sell the suit property to the plaintiff.

4. The defendants/appellants contended that the first defendant and one Balusamy, as partners of M/s.Zenith Exports, which functioned at Veerapandi, Tiruppur town, were producing and exporting banian cloths. In order to develop the business, they had obtained a loan from Bank of Maharashtra, Peelamedu Branch, Coimbatore, for which, the sale deed in Document No.19298/2011, of SRO, Palladam was pledged to the said bank. A registered mortgage deed was executed in favour of the Bank, in Document No.15975/2012 dated 18.10.2012 and in Document No.10307/2013 dated 31.07.2013 of SRO, Palladam. Neither the 1st defendant nor his partner Balusamy mortgaged any immovable property to the Bank. In view of the fact that the business may also meet a loss, the plaintiff insisted that his property should be appropriately secured, and hence insisted to execute a sale agreement in his favour, and as such, the suit sale agreement dated 17.10.2012, was executed and registered on 18.10.2012, as document No.2696/2012 of Chennimalai SRO. It is contended by the defendant that the suit sale agreement was created as only a security, which can be inferred from the fact that the suit sale agreement was registered between 2.00 p.m and 3.00 p.m., on 18.10.2012 at SRO Chennimalai, and the mortgage deed in favour of the Bank of Maharashtra was registered between 3.00 p.m and 4.00 p.m., on the same day at SRO, Palladam. Balusamy relieved himself from the partnership, when the business took a downtrend, and later, the plaintiff and the 1st defendant had to wind-up the business, because of the losses incurred. Thus, the Bank of Maharashtra has filed O.A.No.94 of

2015 before the Debt Recovery Tribunal, Coimbatore, for recovery of the mortgage amount by invoking the provision of the Securitisation and Re-Construction of Financial Assets and Enforcement of Security Interest Act (SARFAESI Act), 2002. Under these circumstances, the plaintiff has filed a suit to safeguard the ground, on the basis of the sale agreement for security. It is contended that the averments in the plaint that the plaintiff has paid an advance amount of Rs.11,00,000/-, are false and incorrect. The plaintiff has no means to purchase the suit property. The actual value of the suit property is also not stated in the plaint. The valuation of the suit is incorrect.

5. The Trial Court framed the issues as follows;

1. Is the suit sale agreement supported by consideration as claimed?
2. Was the plaintiff ready and willing to perform his part of the contract, as claimed?
3. Is the plaintiff entitled to the relief of specific performance as claimed?
4. To what other reliefs the parties are entitled to?

6. The suit was trialed by the Trial Court and the plaintiff examined himself as P.W.1 and marked Ex.A1 to A.10 on his side, and also admitted Ex.B1 in his cross-examination. His wife Maragatham was examined as P.W.2. The defendants examined themselves as D.W.1 and D.W.3, and also examined Shanmugasundaram and Subaraj as D.W.2 and D.W.4, and also marked as Ex.B2 to B5 and Ex.X.1 on their side.

7. With reference to Issue No.1, the Trial Court considered the sale agreement Ex.A1, which is the vital agreement for the purpose of deciding the issue regarding the consideration passed in lieu of the agreement. It was found that the defendants had canceled the prior sale agreement with one Krishnasamy, and thereafter entered into a sale agreement with the plaintiff (Ex.A1 Sale agreement). The said fact was considered as a clinching evidence for the purpose of consideration of the suit sale agreement, based on bank accounts or audit reports or otherwise, so as to establish the transactions between the defendants and D.W.2, Thiru.Shanmugasundaram. The D.W.2 was examined by the defendants citing just cause for the purpose of establishing the fact that the defendants have borrowed a sum of Rs.8,00,000/- from D.W.2 and to clear the due amounts to Krishnasamy, which was the previous sale agreement.

8. This Court is of the opinion that if the defendants have borrowed a sum of Rs.8,00,000/- from an interested evidence, then he has to establish the source, through which, the amount was paid or in what manner the amount was paid. A mere statement that D.W.2/Mr.Shanmugasundaram paid a sum of Rs.8,00,000/- to

the defendants, so as to clear the due amounts is absolutely insufficient. In such circumstances, the Trial Court raised a doubt regarding the statement made by D.W.2 in this regard. This Court is of the strong opinion that a mere statement of witness to establish a monetary transaction is insufficient. As far as the money transactions are concerned, beyond the statement of witnesses, sufficient proof must be filed before the Court and the manner, through which, the money was transacted as well as books of account or bank statements or all connected records should be adduced before the Court. However, none of these documents were filed before the Trial Court by the defendants. Contrarily, the defendant examined his own witness D.W.2/Mr. Shanmugasundaram, who in turn, deposed that the defendant borrowed a sum of Rs.8,00,000/- and cleared the amounts due to Mr. Krishnasamy, so as to come out from the first sale agreement and thereafter, the sale agreement Ex.A1 was registered. At this juncture, on examination of the findings of the Trial Court, this Court is of the opinion that in the absence of any such independent evidences on the side of the defendant, the Trial Court cannot arrive at a conclusion or accept a mere statement of the interested witness D.W.2, who was examined by the defendant himself. Thus, the Trial Court refused to accept the deposition of D.W.2 and made a finding that there is a doubt with regard to deposition of D.W.2 in this regard and accordingly, arrived at a conclusion that the said statement was not even pleaded by the defendant in their written statement. If at all the genuinity is to be tested, there are no such pleadings in the written statement.

9. Thus, this Court is of the opinion that such depositions are undoubtedly afterthought for the purpose of contesting the plaint. The pleadings which are all doubt in their written statement, if taken, subsequently, the same must be established beyond any pale of doubt. Therefore, this Court is of the opinion that no pleadings were taken in this regard by the defendants in their written statement and a mere statement made by D.W.2 before the Court cannot be trusted upon so as to disprove the consideration passed on for the purpose of registering a prior sale agreement. The proximity of time was also considered by the Trial Court and subsequently, the suit sale agreement was marked as Ex.A1. Considering all these documents and evidences, the Trial Court arrived at a conclusion that the suit sale agreement viz., Ex.A1 is supported by consideration. Accordingly, Issue No.1 is answered in favour of plaintiff.

10. As far as the Issue Nos.2 and 3 are concerned, the Trial Court cogently considered the facts and circumstances and arrived at a conclusion that the readiness and willingness to perform his part of the agreement was not established by the plaintiff. Thus, the relief of specific performance was denied

by the Trial Court. The readiness was not established on account of the fact that a major amount was paid as advance and a meagre amount was retained as the balance sale consideration and that an inordinately long period of three years was fixed to conclude the sale, and the fact that the plaintiff has not produced any evidence to show that all along from the date of agreement, he was ready and willing to perform his part of the agreement.

11. This being the factum, the Trial Court rightly rejected the relief as such sought for specific performance and considered the issue No.4 and accordingly, granted the relief of return of the advance amount of Rs.11,00,000/- from the defendants, with just interest. Consequently, the Trial Court decreed the suit partly as the suit was dismissed as regards the relief of specific performance and delivery of possession of the suit properties. However, the Trial Court directed the defendants to repay the advance amount of Rs.11,00,000/- to the plaintiff with interest, at the rate of 12% per annum, from the date of agreement, till the date of filing of the suit, and thereafter, at the rate of 9% per annum, till today, and thereafter, at the rate of 6% per annum till full and final repayment. Further, a relief was granted that a charge over the suit property shall be created for due repayment of the amounts indicated by the Trial Court and the defendants were directed to pay the cost to the plaintiff.

12. Considering the findings as well as the discussions made in the aforementioned paragraphs, this Court has no hesitation in coming to a conclusion that there is no perversity or infirmity in respect of the findings of the Trial Court in considering the documents and evidences produced by the respective parties before the Trial Court. Thus, this Court is not inclined to interfere with the findings and accordingly, the judgment and decree dated 20.11.2017 passed in O.S.No.209 of 2015 is confirmed and consequently, the first appeal stands dismissed. No costs.

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Sd/-

Assistant Registrar (CO)

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Sub Assistant Registrar

ssb

To

The Second Additional District Judge,
Erode.

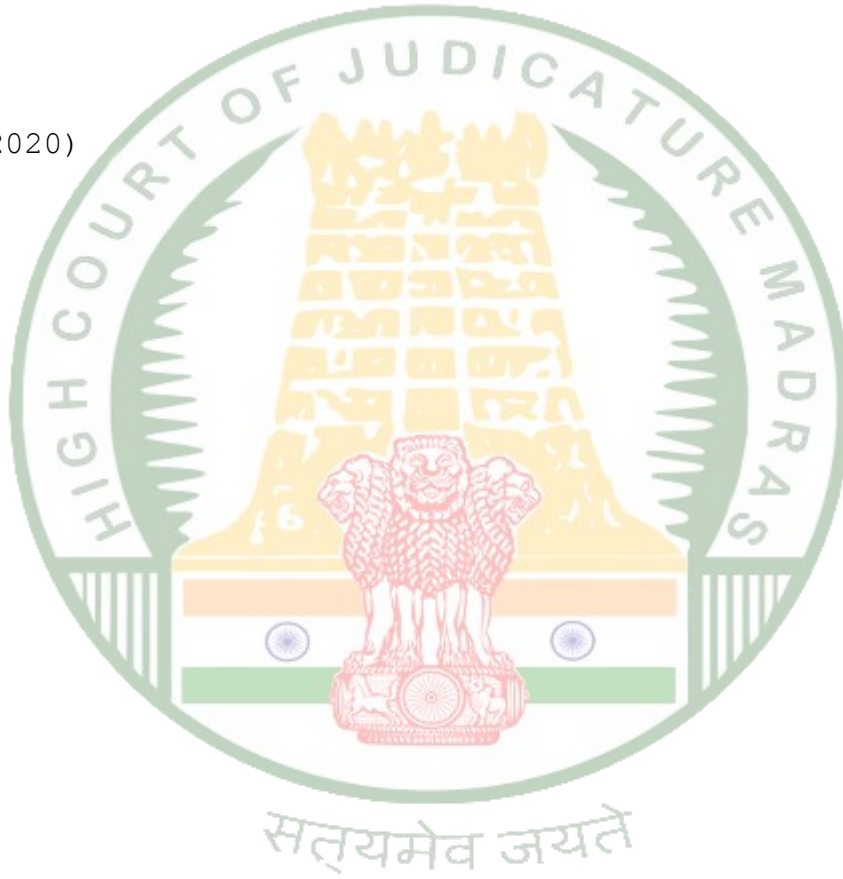
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V.R. Section, High Court,
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+1cc to Mr.R.Prabakar, Advocate, S.R.No. 104103

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KK (CO)
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